

DEPT. OF JUSTICE  
**TRANSCRIPT OF RECORD.**

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1920.**

No. **582**

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**CHARLES I. DAWSON**, Attorney General of the Commonwealth of Kentucky, and individually, **LOUISVILLE PUBLIC WAREHOUSE COMPANY** (a corporation); **JOHN J. CRAIG**, Auditor of the State of Kentucky, and individually,  
*Appellants.*

*vs.*

**THE J. & A. FREIBERG COMPANY**, (Incorporated)  
*Appellee.*

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**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF KENTUCKY.**

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Filed, Oct 11, 1920.

(27939)

# SUPREME COURT OF THE UNITED STATES

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CHARLES I. DAWSON, Attorney General of the Commonwealth of Kentucky, and individually, LOUISVILLE PUBLIC WAREHOUSE COMPANY (a corporation); JOHN J. CRAIG, Auditor of the State of Kentucky, and individually,  
*Appellants,*

*versus*

THE J. & A. FREIBERG COMPANY, (Incorporated)  
*Appellee.*

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

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## TRANSCRIPT OF RECORD.

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THE J. & A. FREIBERG COMPANY  
(Incorporated), - - - - - Plaintiff,

versus

LOUISVILLE PUBLIC WAREHOUSE  
COMPANY (a corporation);

JOHN J. CRAIG, Auditor of the State of  
Kentucky, and individually;

CHARLES I. DAWSON, Attorney General  
of the Commonwealth of Kentucky, and  
individually, - - - - - Defendants.

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Proceedings of the District Court of the United States  
for the Western District of Kentucky, at a regular  
term thereof begun and held at the Federal Court  
Hall in the City of Louisville, on March 8, 1920.

PRESENT: HON. A. C. DENISON, Judge of the United States  
Circuit Court of Appeals for the Sixth  
Circuit;

HON. WALTER EVANS, Judge of the United  
States District Court for the Western Dis-  
trict of Kentucky;

HON. J. E. SATER, Judge of the United States  
District Court for the Southern District of  
Ohio,

sitting in pursuance with the requirements of  
Section 266 of the Judicial Code to hear and  
determine the above mentioned cause.

BE IT REMEMBERED that heretofore, to-wit: on  
the 29th day of April, 1920, came the plaintiff and filed  
in the Clerk's office of the said Court its Bill of Com-  
plaint, which is in words and figures as follows, to-wit:



IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE WESTERN DISTRICT OF  
KENTUCKY, IN EQUITY No. 77.

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THE J. & A. FREIBERG COMPANY  
(Incorporated), - - - - - *Plaintiff,*

versus

LOUISVILLE PUBLIC WAREHOUSE  
COMPANY (a corporation);  
JOHN J. CRAIG, Auditor of the State of  
Kentucky, and individually;  
CHARLES I. DAWSON, Attorney General  
of the Commonwealth of Kentucky, and  
individually, - - - - - *Defendants.*

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**Bill of Complaint.**

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(1) The plaintiff, The J. & A. Freiberg Company, avers that it is, and at all the times herein mentioned was, a corporation, created and organized under and pursuant to the laws of the State of Ohio, and not by or pursuant to the laws of the State of Kentucky, and is a corporation and citizen of the State of Ohio, and not of the State of Kentucky; and that the defendants, and each and every one of them are citizens of the State of Kentucky and inhabitants of the respective districts of Kentucky as residents of the State of Kentucky, as follows:

The defendant, Louisville Public Warehouse Company, is a corporation, created and organized under the laws of the State of Kentucky, having its chief place of business in Jefferson County, Kentucky, and has power

to sue and be sued, and is now and has been for more than twenty years engaged in a general warehouse business, and has been for more than twenty years and is now established by the Commissioner of Internal Revenue, under the Statutes of the United States, as a general bonded warehouse of the United States for the storage of distilled spirits, and has complied with the laws and regulations of the United States Government pertaining thereto, and is a resident of and domiciled in the Western District of Kentucky.

The defendant, John J. Craig, is the duly elected, qualified and acting Auditor of Public Accounts of Kentucky, and is a resident and inhabitant of Kentucky and of the Eastern District thereof.

The defendant, Charles I. Dawson, is the duly elected, qualified and acting Attorney General of the Commonwealth of Kentucky, and is a citizen and inhabitant of the Eastern District of Kentucky.

And the said defendants, John J. Craig and Charles I. Dawson, now reside temporarily in the City of Frankfort in Franklin County, Kentucky.

And the matter or amount in dispute in this suit exceeds the sum or value of \$3,000, exclusive of interest and costs.

(2) That the plaintiff was formerly engaged in the business of wholesale liquor dealer, with its place of business at Cincinnati, Ohio, where it was qualified, under State and Federal laws, to engage in that business, but has not been for many months, and since January 1, 1920, and is not now, engaged in that business.

That while engaged in the business of wholesale liquor dealer plaintiff purchased distilled spirits known as whiskey in bond, by virtue of the purchase of negotiable warehouse receipts therefor, and either sold such ware-

house receipts to others or tax paid the whiskey covered thereby and merchandised in said whisky. That when plaintiff ceased to carry on the business of wholesale liquor dealer and closed said business it was still the owner of certain distilled spirits known as whisky situated in Government bonded warehouses, plaintiff owning negotiable warehouse receipts therefor, and that certain of said whisky was on deposit in a distillery bonded warehouse in the State of Kentucky, and is the subject of this suit, as more particularly hereinafter set forth.

(3) Plaintiff states more particularly that more than three years ago, to-wit: in October, 1916, plaintiff purchased from T. E. O'Keefe, Proprietor of the Imperial Distillery, Incorporated, Distillery No. 8, Second District of Kentucky, located at Stanley, Kentucky, certain distilled spirits, receiving the negotiable warehouse receipts of said Imperial Distillery, Incorporated, therefor, as follows: 204 barrels, bearing the brand Imperial Distillery, and serially numbered as follows: 64524, 64827 to 64989, and 66440 to 66479, all inclusive; that said barrels contained on original gauge in all 9707.99 wine gallons and 9804.62 proof gallons; and that the barrels were of the production of said Imperial Distillery of April and May in the year 1916, and are now of four years of age and available for commercial sale as matured whisky for medicinal purposes; and plaintiff states that there are now contained in the barrels in excess of 8,000 proof gallons of distilled spirits known as whisky.

The plaintiff continued to own the warehouse receipts for said barrels and that said barrels continued in the distillery bonded warehouse of the producing distillery until the end of the year 1919, when plaintiff, as owner thereof, was requested by the distiller to have the same removed from the distillery bonded warehouse because

it was the desire and purpose of said distiller to have all bonded distilled spirits in said warehouse removed in order that said distillery and warehouse could be closed and all Government bonds thereon canceled. That plaintiff thereupon directed that said distilled spirits be removed in bond by said distiller to the General Bonded Warehouse No. 1, Fifth District of Kentucky, operated by the Louisville Public Warehouse Company, a defendant herein. That plaintiff's barrels above described were so removed and arrived at said General Bonded Warehouse No. 1 and were received by said Louisville Public Warehouse Company, owner thereof, a defendant herein, on the first and second days of January, 1920, and have since the latter date been in deposit and on storage therein in full compliance with the laws of the United States and of all valid laws of the Commonwealth of Kentucky; and that the plaintiff is now the owner thereof, and the defendant, Louisville Public Warehouse Company, is a bonded warehouseman and bailee for hire in possession thereof for plaintiff, subject to the laws of the United States controlling general bonded warehousemen and their possession of distilled spirits in bond, subject to Federal taxes on such distilled spirits. The plaintiff is informed that said Louisville Public Warehouse Company, as general bonded warehouseman, holds all necessary power of attorney from the original distiller to the use of plaintiff, as owner of the described distilled spirits, for further removal in bond to another general bonded warehouse of the United States, in full compliance thereto with the laws of the United States, so as to be able, in full compliance with all laws of the United States, to ship plaintiff's described distilled spirits in bond to another general bonded warehouse in the United States. The plaintiff upon the removal in bond of the described dis-

tilled spirits from the distillery bonded warehouse surrendered its negotiable distillery bonded warehouse receipts and had delivered to it by the Louisville Public Warehouse Company the negotiable warehouse receipts of the defendant, Louisville Public Warehouse Company, for the described distilled spirits, and now holds the same as property of the plaintiff.

(4) That on, to-wit: the 22nd day of April, 1920, plaintiff directed the defendant, Louisville Public Warehouse Company, to remove said barrels of distilled spirits from its general bonded warehouse and ship the same in bond to General Bonded Warehouse No. 2, situated at Boston, Massachusetts, Quincy Market & Cold Storage Warehouse Company, proprietor, such removal and shipment in bond being authorized by the Statutes of the United States, the plaintiff making tender of all charges for storage, ad valorem taxes due the State of Kentucky, and other proper payments by plaintiff to the Louisville Public Warehouse Company on account of the storage of said distilled spirits in said Company's warehouse at Louisville, Kentucky. And plaintiff avers and shows that the defendant, Louisville Public Warehouse Company, refused and continues to refuse to make such withdrawal and shipment, unless the plaintiff pay to said Louisville Public Warehouse Company a sum equal to fifty cents per proof gallon upon each proof gallon of distilled spirits known as whisky contained in the aforesaid barrels, and plaintiff is advised and informed by the defendant, Louisville Public Warehouse Company, that the reasons for its refusal are as follows:

That on, to-wit, the 12th day of March, 1920, an Act of the General Assembly of the Commonwealth of Kentucky was approved, as follows:

*"AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whisky or brandy or other species of double stamp spirits in this state, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the taxes so collected; repealing all other license, franchise and excise taxes on the businesses covered by this Act; and declaring an emergency to exist.*

*"Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

*"1. Every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits, known as whisky or brandy or other species of double stamp spirits, in this state; and every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale, or for any other purpose, shall pay an annual license tax to the Commonwealth of Kentucky of fifty cents on every proof gallon of said distilled spirits so manufactured or stored in a bonded warehouse, or withdrawn from a bonded warehouse, or transferred therefrom under bond out of the Commonwealth of Kentucky.*

*"2. Every corporation, association, partnership and individual owning, controlling or operating a bonded warehouse in this state, wherein distilled spirits known as whisky or brandy or other species of double stamp spirits are stored, shall, on or before the first day of June, 1920, on blanks furnished by the Auditor of Public Accounts, report to the Auditor of Public Accounts the total amount of such*

spirits stored in a bonded warehouse owned, controlled or operated by such corporation, association, partnership or individual; and shall make monthly reports to the Auditor of Public Accounts thereafter, which reports must be signed and sworn to by such person, or, in case of a corporation, association or partnership, by some officer or person authorized to make such oath. The first report provided for herein shall show the number of proof gallons of such spirits withdrawn from said warehouse from the date this Act becomes effective to the date of making such report; and each monthly report thereafter shall show the number of proof gallons placed in said bonded warehouse since the date of making the last preceding report, the number of proof gallons withdrawn or transferred since the date of making the last preceding monthly report, and the aggregate number of gallons on hand at the date such report is made. In all cases where such spirits are transferred under bond from one bonded warehouse in this Commonwealth to another, said report shall show the warehouse from which same has been transferred and the warehouse to which same has been transferred, the quantity thereof and the serial number of each of the packages so transferred.

"3. Every person, corporation, association or partnership operating, owning or controlling such bonded warehouses, shall, at the time said reports herein provided for are made, pay to the Auditor of Public Accounts the tax of fifty cents per proof gallon upon each proof gallon of such spirits removed from the bonded warehouse owned, controlled or operated by such person, corporation, association or partnership, or transferred under bond out of this state, up to the date of making such report; and for the purpose of securing the payment of the license taxes herein provided for, the Commonwealth shall have a lien on all such spirits stored in such bonded warehouses, together with the other property of the bonded warehousemen used in connection therewith; and in all cases where the spirits so removed or transferred were owned or controlled by another than the bonded warehousemen, then the bonded warehouseman shall collect and pay the tax due on such spirits so removed or transferred under bond,



and shall be subrogated to the lien of the Commonwealth.

"4. Every corporation, association, partnership and individual engaged in distilling spirits known as whisky or brandy or other species of double stamp spirits in this state, shall pay the license tax herein provided upon all such spirits so manufactured and removed from the premises without being placed in a bonded warehouse at the date of the removal of such spirits; and all such corporations, associations, partnerships and individuals engaged in the business of distilling such spirits in this state shall file monthly statements with the Auditor of Public Accounts, on blanks to be furnished by the Auditor, which statements must be sworn to and which statements shall show the number of proof gallons of such spirits so distilled and removed from the premises without having been stored in a bonded warehouse, and at the time of filing such statements shall pay to the Auditor of Public Accounts the amount due on such spirits so manufactured and removed; and for the payment of the taxes due under this provision, the Commonwealth shall have a lien upon all the machinery and the premises and the manufactured spirits made thereon, of the corporation, association, partnership or individual engaged in such distilling business.

"5. Every person, corporation, association or partnership failing to make the reports herein provided for, in the manner herein provided for, and failing to pay the taxes as they become due, as herein provided for, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred dollars nor more than one thousand dollars, and each day after the date such report is due that such person, corporation, association or partnership is in default shall be treated and considered as a separate offense.

"6. The tax herein provided for, when collected, shall be distributed as follows: To the State Road Fund, sixty-five per cent thereof; to the General Expenditure Fund, thirty-five per cent thereof.

"7. The license tax herein imposed shall be in lieu of all other license, franchise or excise taxes now imposed by law on persons, corporations, partnerships or associations engaged in business covered



by this Act; and all Acts in conflict therewith are hereby repealed, and especially there is hereby repealed Chapter 5 of the Acts of the Special 1917 Session of the General Assembly of Kentucky.

"8. Whereas, many persons, corporations, associations and partnerships are now engaged in the business covered and licensed by this Act, without paying an adequate license tax to the Commonwealth of Kentucky therefor; and whereas, the liquor which they are handling and in which they are dealing is constantly in large quantities being removed from the bonded warehouses and disposed of, without the state securing an adequate license tax thereon, an emergency is hereby declared to exist, and this Act shall take effect from and after the date of its passage and approval by the Governor."

The defendant, Louisville Public Warehouse Company, asserts that the tax of fifty cents per proof gallon must be paid by it as a warehouseman, and that in the event it, as warehouseman, removes, delivers or ships, in bond, to another general bonded warehouse, the aforesaid distilled spirits, without having collected the said tax of fifty cents per proof gallon, it will be obligated to pay to the Auditor of Public Accounts for the Commonwealth of Kentucky, a defendant herein, the total amount of tax on plaintiff's distilled spirits, and by losing possession of the distilled spirits will lose its statutory subrogated lien thereon, and failing such payment to the said Auditor of Public Accounts, the latter, for the State, will assert a lien upon the property of the said defendant used in connection with such storage, and that thereby a cloud will be cast upon its title to its said real-estate and other property; and it fears that it will be subjected, for failure to report or to pay, as provided in the fifth section of said Act, to large and numerous fines and penalties and to criminal prosecutions.

(5) The defendant, John J. Craig, as Auditor of Public Accounts for the Commonwealth of Kentucky, is charged with the duty, in the Act last quoted, of receiving the payment of fifty cents per proof gallon upon each proof gallon of whisky removed from bonded warehouses, as provided in section three thereof; and to receive the reports from the warehousemen, provided for in section two of said Act; and the plaintiff is advised and informed that the defendant, John J. Craig, as Auditor of Public Accounts, proposes, unless enjoined, to enforce all liens, penalties and fines in case of failure to make the reports and to pay the taxes attempted to be provided for by said Act. And plaintiff is further informed that in such threatened and proposed enforcement the defendant, John J. Craig, will report all cases of alleged failure to make reports and pay taxes to the defendant, Charles I. Dawson, as Attorney General of the Commonwealth of Kentucky.

(6) Plaintiff is advised and informed that the defendant, Charles I. Dawson, as Attorney General of the Commonwealth of Kentucky, is the chief law officer of the Commonwealth of Kentucky and of all of its departments, and as such threatens and proposes, unless enjoined, in the enforcement of said Act, to bring suits and prosecutions to enforce liens, collect the taxes attempted to be assessed, and to enforce all penalties and fines attempted to be provided in cases of violation of the terms of said Act.

(7) The plaintiff avers that it is not now engaged in any occupation or business in the Commonwealth of Kentucky, in or about or in connection with the aforesaid described whisky, but that the aforesaid whisky was purchased by it in bond and removed to the General Bonded

Warehouse No. 1 conducted by the defendant, Louisville Public Warehouse Company, and is now in said General Bonded Warehouse No. 1 in storage, as alleged, and except for these facts plaintiff is in no way engaged in business in the State of Kentucky in the premises set forth. That the plaintiff does not propose to do any business or make any sales of its whisky in Kentucky, but desires only to remove the same in bond to the State of Massachusetts, and when commercially feasible to sell the same by sale of its warehouse receipts therefor as authorized and permitted by the laws of the United States.

(8) Plaintiff shows that distilled spirits in bond are subject to loss by leakage and evaporation, and that in long continued storage large losses occur due to these causes; that under the Internal Revenue Laws of the United States distilled spirits can not be bottled in bond in a general bonded warehouse; and that, therefore, plaintiff, in case it is long delayed in disposing of its title to its distilled spirits above described, cannot have the same bottled in bond to avoid further loss by leakage and evaporation, and only by withdrawal from general bonded warehouse and bottling, after tax payment, can such saving be availed of; and that plaintiff, not having any prospective purchaser for said distilled spirits and facing a long continued ownership thereof, is confronted with great and irremediable loss through its inability to have its distilled spirits removed as desired, or, if necessary to their preservation by bottling, to tax pay and withdraw same for bottling, after tax payment, except upon the payment of the illegal assessment of fifty cents per proof gallon as attempted to be made the condition of removal for any purpose by the Act aforesaid and by the conduct of the defendants herein based upon the color of said Act.

And plaintiff further avers on information from official sources and on its own belief that there is now in bonded warehouses elsewhere than in the State of Kentucky and within the United States distilled spirits known as whiskey to an amount exceeding 50% of such spirits in bond in the United States; and upon information from official sources and on its own belief plaintiff avers that such spirits in bond are sufficient to supply all demand of the trade for which such spirits are salable for a period of many years exceeding five years; and on information and belief plaintiff avers that one large distillery in the United States and outside of the State of Kentucky is now operating manufacturing distilled spirits known as whisky, and that several other large distilleries located outside of the State of Kentucky and in the United States have declared their intention of and are now preparing to engage in the manufacture of distilled spirits known as whisky; and such new production of distilled spirits known as whisky will supply the demand therefor at a price far below the cost and carrying charges of this plaintiff upon its whisky if the plaintiff's whisky is subjected to the tax of fifty cents per proof gallon now claimed by the defendants herein in behalf of the Commonwealth of Kentucky. And plaintiff further avers that the price or value in bond of whisky of the character herein suit is approximately one dollar per proof gallon, such prices varying, according to information and belief, from seventy cents to one dollar per proof gallon; and the plaintiff is in direct competition with others engaged in a similar business in the sale of such distilled spirits known as whisky at said prices. That there are large quantities of distilled spirits known as whisky of Kentucky production in bond outside of the State of Kentucky with which distilled spirits plaintiff's above described

whisky must come in competition for ultimate sale. And plaintiff further avers that for the defendants, or the Commonwealth of Kentucky, to levy or collect, in the form of a license tax of otherwise, a tax at the rate of fifty cents per proof gallon per annum, or even for one year, upon plaintiff's above described distilled spirits known as whisky, would be to destroy and confiscate the plaintiff's property and deprive the plaintiff of its property.

(9) Plaintiff avers that the assessment or collection by any process or means of the aforesaid so-called and described license tax of fifty cents per proof gallon upon its aforesaid distilled spirits known as whisky would be to take plaintiff's property and to deprive plaintiff of its property without due process of law, and to deny to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

And plaintiff further avers that said license tax upon its distilled spirits and the alleged lien created upon its property violates the thirteenth and fourteenth sections of the Bill of Rights of the Constitution of the State of Kentucky; and that as a license tax, if such proposed tax be, in fact, a license tax upon any occupation which plaintiff can be said to be engaged in, is so enormous and confiscatory upon the alleged business or occupation of owning whisky in bond, which the plaintiff avers is not a business, that it is prohibitive of a useful and legitimate occupation and destructive thereof and invalid under the Constitution of the State of Kentucky; and plaintiff further avers that said tax and the Act attempting to create said tax, are in violation of the taxing provisions of the Constitution of the State of Kentucky and void.

Plaintiff avers that the unauthorized and illegal attempted tax aforesaid by creating a statutory lien in behalf of the Commonwealth, and by the attempted subrogation of the defendant warehouseman to such lien, creates a cloud upon the property of the plaintiff, and unless restrained and enjoined, as hereinafter prayed, the defendants, officers of the Commonwealth, and the defendant, Louisville Public Warehouse Company, will engage in a multiplicity of suits involving plaintiff's property for the penalties continually accruing and to accrue for a violation of the Act, aforesaid, and plaintiff and plaintiff's property will be subjected to a multiplicity of suits, liens and liabilities, against which plaintiff will have no adequate remedy at law, or any remedy at law, for the protection of plaintiff's rights or the preservation and enjoyment of its property aforesaid, but would be subjected to great and irreparable injury unless this Court will interfere by injunctive process to restrain the enforcement and collection of said claims, taxes and penalties.

WHEREFORE and for as much as the plaintiff is remediless in the premises according to the common law and remediable only in equity, and to the end that plaintiff may not be subjected to a multiplicity of suits which would otherwise result, and may not suffer irreparable injury and damage, and may be permitted to pursue and carry on its business without hindrance or obstruction, and a cloud upon the title to its property may be removed, the plaintiff prays:

(1) That a writ of subpoena issue against the defendants and each and every one of them named and described, as aforesaid, to appear and full and true answers make to this Bill of Complaint, but not under oath, answer under oath being hereby waived; and

(2) That the defendant, Louisville Public Warehouse Company, be enjoined from further refusing, upon the plaintiff's paying all other charges, taxes and claims accrued against the plaintiff's above described whisky, excepting only the tax of fifty cents per proof gallon endeavored to be assessed and collected by the aforesaid Act, to ship and transport the same in bond to a general bonded warehouse in Boston, Massachusetts, or elsewhere, when and as the plaintiff may direct; and that the defendant, Louisville Public Warehouse Company, be enjoined from asserting any lien for said tax of fifty cents per proof gallon upon plaintiff's described whisky by subrogation or otherwise under color of the Act aforesaid; and

(3) That the defendants, John J. Craig and Charles I. Dawson, be enjoined and restrained from demanding in any manner, by suit or otherwise, the making of a report upon plaintiff's described whisky, or as to its removal under the Act aforesaid, and from endeavoring, by suit or otherwise, to collect the said tax, or any part thereof, upon plaintiff's described distilled spirits, and from asserting, or attempting to enforce, any lien thereon for the said tax under the Act aforesaid; and

(4) That the defendant, Charles I. Dawson, be enjoined and restrained from instituting any action or procuring any indictment, warrant, or otherwise proceeding in equity or at law, to coerce the payment by plaintiff of any tax under the aforesaid law assuming to levy an annual tax at the rate of fifty cents per proof gallon per annum, or otherwise, under color of said Act, on said whiskey of the plaintiff, or the penalties or fines prescribed in the Act aforesaid; and

(5) That meanwhile a temporary restraining order issue in accordance with this prayer for a preliminary

injunction; and for all other and further general and equitable relief to which the plaintiff may be entitled, including its costs herein incurred; which to this Court may in equity seem meet and right.

THE J. & A. FREIBERG COMPANY,

By J. ARTHUR FREIBERG,

*Secretary.*

LEVI COOKE,

TRABUE, DOOLAN, HELM & HELM,

*Counsel for Plaintiff.*

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UNITED STATES OF AMERICA,  
COUNTY OF HAMILTON,  
STATE OF OHIO.

On this 24th day of April, 1920, before me personally appeared in the above County and State J. ARTHUR FREIBERG, who made solemn oath that he is the Secretary and executive officer of THE J. & A. FREIBERG COMPANY, the above named plaintiff, and that he read the foregoing Bill of Complaint and subscribed the same in my presence, and that he knows the contents thereof and that the same is true to his own knowledge, except as to the matters therein stated on information and belief, and as to these matters he believes them to be true.

My commission expires on the 16th day of November, 1921.

A. J. FREIBERG,

Notary Public, Hamilton County, Ohio.

(SEAL)



**Motion for Interlocutory Injunction—Filed**  
April 29, 1920.

Now comes the plaintiff, The J. & A. Freiberg Company, and moves the Court for an interlocutory injunction, in accordance with the prayer of the petition, and shows that the granting of said motion would involve the restraining of the acts of the officers of the State of Kentucky acting under color of a law of the State of Kentucky; and requests that the Court, in compliance with Section 266 of the Judicial Code, request the assistance of two qualified Judges, in hearing and determining this application; and the plaintiff will give more than five days notice to the defendants and to the Governor and Attorney General of the Commonwealth of Kentucky that such motion will be called up for hearing in this Court at 10 o'clock of the morning of Friday, the 7th day of May, 1920, or as soon thereafter as the Court may direct for the hearing of this motion.

LEVI COOKE,

TRABUE, DOOLAN, HELM & HELM,

*Attorneys for Plaintiff.*

**Affidavit of Joseph Debar**—Filed April 29, 1920.

UNITED STATES OF AMERICA, }  
STATE OF OHIO, } SS.  
COUNTY OF HAMILTON. }

The affiant, JOSEPH DEBAR, being first duly sworn, on oath states:

I am a resident and citizen of the City of Cincinnati, State of Ohio, and for the 45 years preceding April 1st, 1918, was engaged in the business of buying and selling distilled spirits known as whiskey. At the present time I am, and have been for the four years last past, President of the National Association of Distillers and Wholesale Dealers. For the six years preceding such period of four years, I was Secretary of the same organization. During the period in which I was engaged in the wholesale liquor business and during such time as I have occupied an official position with the National Association of Distillers and Wholesale Dealers, I have been familiar with the market prices obtainable for distilled spirits known as whiskey in the various markets throughout the United States. I have also kept informed upon the amount of such whiskey stored in distillery and general bonded warehouses throughout the United States and also as to the amount located in the various States respectively.

At the present time there are stored in the United States in distillery and general bonded warehouses and evidenced by warehouse receipts covering same, approximately 50,000,000 gallons of distilled spirits known as whiskey. This is approximately the amount of actual gallons now stored in the United States, although the warehouse receipts evidencing same call for an amount

of approximately 20 per cent in excess of 50,000,000 gallons, by reason of the fact that such warehouse receipts are based upon and issued for the amount of whiskey originally placed in bond. Such original amount is subject to evaporation and shrinkage during all of the period in which it remains in bonded warehouses in the original barrels.

I am familiar with the quality and price obtainable for distilled spirits known as Bourbon whiskey stored in the various distillery and general bonded warehouses in the State of Kentucky. I am also familiar with the price obtainable for similar distilled spirits known as Bourbon whiskey stored in distillery and general bonded warehouses in the various States outside of the State of Kentucky.

The price obtainable for these distilled spirits known as whiskey, whether manufactured and stored in the State of Kentucky or the States other than Kentucky, prior to the passage of the so-called Vance Act by the legislature of the State of Kentucky, did not vary materially. The quality of these goods is practically the same, whether manufactured and stored in the State of Kentucky or manufactured and stored in States other than Kentucky.

At the present time in marketing distilled spirits, known as whiskey, if stored in the State of Kentucky, it is necessary to accept a price approximately 50 cents per actual gallon less than that obtainable for similar goods stored in States other than Kentucky. No other State has a tax equal to or similar to the 50 cents per gallon tax imposed by the so-called Vance Act upon goods stored in the State of Kentucky.

At the present time approximately one-half of the distilled spirits known as whiskey stored in the United States is stored in distillery and general bonded ware-

houses in the State of Kentucky. The remainder of such distilled spirits known as whiskey is stored in the various States other than Kentucky.

The amount of such distilled spirits known as whiskey stored in States other than Kentucky is sufficient to supply the demand of the consumers in the United States. for a period in excess of five years.

At the present time the well known Large Distilling Company, located near Pittsburgh, Pa., is manufacturing and storing in their distillery bonded warehouse, distilled spirits known as whiskey, the same being similar in character to the distilled spirits known as whiskey now stored in the State of Kentucky.

Other distillers are in a position to and have declared their intention to also manufacture, should the demand justify the same, such distilled spirits known as whiskey. Such distilled spirits known as whiskey can now be manufactured for approximately 40 to 50 cents per gallon and being stored in steam heated warehouses, can be sold at the end of four years, at which time such goods are suitable for medicinal use at a price not to exceed 70 cents per gallon.

Such information as I am able to obtain would indicate that prior to the time at which the distilled spirits known as whiskey now stored in distillery and general bonded warehouses outside of the State of Kentucky is consumed, that an amount sufficient to supply the future demand for the same throughout the United States, can be and will have been manufactured in distilleries located in States other than Kentucky.

And further affiant saith not.

JOSEPH DEBAR.

**Affidavit of Samuel Freedman**—Filed April 29, 1920.

UNITED STATES OF AMERICA, }  
STATE OF OHIO, } SS:  
COUNTY OF HAMILTON. }

The affiant, SAMUEL FREEDMAN, being first duly sworn, on oath states:

I, SAMUEL FREEDMAN, a resident and citizen of the city of Cincinnati, State of Ohio, have been engaged for the past twenty years in the business of buying and selling for my own account, and the account of others, distilled spirits known as whiskey.

At the present time I am a member of the firm of Freedman and Richard engaged in the whiskey brokerage business, with headquarters in the city of Cincinnati, but buying and selling distilled spirits known as whiskey throughout the United States; said distilled spirits known as whisky, being stored in distillery bonded warehouses, and general bonded warehouses located in various States of the United States.

I have been, during the period above mentioned, and am now familiar with market conditions effecting the sale and prices obtained therefor of distilled liquor known as Bourbon whiskey, similar to the distilled liquor manufactured in the year nineteen sixteen (1916) at the Imperial Distillery, known as distillery number eight (No. 8) located in the second district of Kentucky at Stanley, Kentucky.

These liquors do not vary in quality to any appreciable extent from the distilled spirits known as Bourbon Whiskey manufactured at other distilleries located in various States outside of the State of Kentucky, and in marketing such distilled spirits it has always been neces-

sary to compete with the similar distilled spirits manufactured in other States.

The prices obtained have and do vary by reason of various factors aside from the quality of the distilled spirits such as accessibility, cost of transportation, taxes assessed against the same, cost of bottling, etc.

In marketing such distilled spirits it has been necessary to sell the same at a price which when the goods reaches the purchaser it will not exceed to him the cost of similar distilled spirits manufactured in other States.

Prior to the passage of the so called Vance Act by the Legislature of the State of Kentucky, distilled spirits known as Bourbon Whiskey stored in distillery bonded warehouses and general bonded warehouses in the State of Kentucky commanded a price substantially equivalent to the prices obtained for similar distilled spirits known as Bourbon whiskey manufactured in other States outside of Kentucky.

Since the passage of the so-called Vance Act by the Legislature of the State of Kentucky, the demand for distilled spirits known as Bourbon whiskey stored in the State of Kentucky, has been exceedingly light in comparison with the large demand for similar distilled spirits stored in other States, and it has been necessary in order to sell such distilled spirits now stored in the State of Kentucky to quote the selling price of the same at approximately fifty cents (50c) per gallon less than can be obtained for similar distilled spirits now stored in the various states other than Kentucky.

I am familiar with the prices now prevailing upon distilled spirits known as Bourbon whiskey in various markets throughout the United States, and from my own knowledge and from the best information obtainable, such distilled spirits known as Bourbon whiskey, if stored in

a State other than Kentucky, can be sold at a price of approximately a dollar fifty cents (\$1.50) to a dollar seventy-five cents (\$1.75) per gallon in bond.

The average price obtainable for such distilled spirits known as Bourbon whiskey, if stored in the State of Kentucky is approximately one dollar (\$1.00) per gallon to dollar twenty five cents (\$1.25) per gallon. And further affiant saith not.

(Signed) SAM FREEDMAN.

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**Affidavit of Thomas S. Jones**—Filed April 29, 1920.

The affiant, THOMAS S. JONES, being first duly sworn, on oath states:

I am a resident and citizen of Louisville, Kentucky, and have been for the past forty years engaged in the business of distilling distilled spirits known as whisky, and for the past twenty years have been engaged actively in the whisky brokerage business. I am familiar with the current market price, especially of Kentucky Bourbon whisky, and with the markets therefor. Such whisky has a large market throughout the whole country and such whisky or whisky of similar character was heretofore produced and is stored in the States of Ohio, Indiana and Illinois and much of such whisky has been heretofore produced and is stored in the States of Ohio, Indiana and Illinois and much of such whisky has been moved in bond, or tax paid, to Eastern States for sale. Such Bourbon whisky habitually comes into competition with Rye whisky manufactured largely in Pennsylvania, Maryland and other Eastern States, which Rye whisky sells practically uniformly at a higher price per proof gallon than does Bourbon whisky, and Bour-

bon whiskies wherever located either within or without Kentucky are in direct competition with each other, based only on such differences in local taxes or transportation charges to the points of demand, which differences are necessarily absorbed by or lost to the seller thereof.

On information and belief I state that there are now located beyond the borders of Kentucky within the borders of the United States distilled spirits, known as whisky, both Rye and Bourbon, to an amount which would satisfy the limited demand under present regulations for such whiskies for several years to come. That the fair and reasonable sale price of distilled spirits known as whisky, and of the Bourbon character thereof, whether such whiskies be stored in Kentucky or in other States of the Union than Kentucky, is in bond approximately from One Dollar to One Dollar and a Quarter per proof gallon, and if the distilled spirits known as whisky in Kentucky in bond are subjected in addition to other taxes to a license tax of fifty cents per proof gallon, such tax would be absorbed by and lost to the owner before he could sell to pharmacists, druggists and other permitted vendors for medicinal use, in competition with similar spirits stored outside of Kentucky. In other words, the market price being fixed by competition the owner of whisky stored in Kentucky could not sell his property until the other whisky had moved unless the owner of whisky in Kentucky were willing to sacrifice his goods and sustain a loss equivalent to the amount of the fifty cent license tax per gallon.

Further affiant saith not.

THOS. S. JONES.



**Affidavit of Milton Barkhouse**—Filed April 29, 1920.

The affiant, MILTON BARKHOUSE, being first duly sworn, on oath states:

I am a resident and citizen of Louisville, Jefferson County, Kentucky, and have been for practically eight years engaged in the business of distilling and selling distilled spirits, known as whisky, and am now Vice-President and acting Manager of the United American Company, a Kentucky corporation, at present engaged in the business of storing whisky, and up to January 1, 1920, extensively engaged in the business of selling whisky through the sale of warehouse receipts covering whisky in bond.

I am now and for years have been familiar with the market quotations on the value of whisky in bond, and such values fluctuate from time to time from various causes of supply and demand, enactment of laws and regulations, cost of transportation and location of goods; but speaking broadly, the value of whisky in bond during the past two months, and now, such as Kentucky Bourbon whisky, has been and is from eighty cents to one dollar and ten cents per proof gallon, original gauge, in bond. The amount of distilled spirits known as whisky stored in bond in Kentucky represents approximately 50% of such commodity, and there is stored in general and distillery bonded warehouses outside of the State of Kentucky, but in the United States, approximately 50% of such supply, and said supply outside of the State would meet the normal demands for five years or more to come, under the limited and restricted conditions now imposed upon the sale of such commodity. And for an owner of whisky stored in Kentucky to compete in the

market generally in the sale of his warehouse receipts with the owners of receipts covering whisky stored outside of Kentucky, it is and will be necessary for the owner of the receipts in Kentucky to absorb the loss or stand the tax imposed by the Vance Act on his goods; or in other words, in order to meet competition the owner of Kentucky whisky will be compelled to sell his goods from forty to fifty cents per proof gallon lower than the current market price outside of Kentucky, after allowing the usual and normal differential in price based upon the normally higher valuation of Rye whiskies of Pennsylvania and Maryland as compared with the normal price of Bourbon whiskies.

In my opinion and based on my experience in the business of distilling and selling whisky, and under the law of competition and supply and demand, the whiskies stored in Kentucky cannot be moved or sold in the trade, unless the owner sustains a loss equal to from 40 to 50% of the market value of his commodity, and if such tax were levied for two years it would represent practically 100% on the present market value of his goods.

Further affiant saith not.

MILTON BARKHOUSE.

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**Affidavit of George R. Landen**—Filed April 29, 1920.

The affiant, GEORGE R. LANDEN, being first duly sworn, on oath states:

I am a resident and citizen of Hamilton County, State of Ohio, and have for seventeen years been engaged in the whiskey brokerage business in the city of Cincinnati and have, since that time, dealt extensively in and kept posted as to the prices of distilled spirits of all kinds,

including Bourbon and Rye whiskies and Brandies, and I keep posted and am now posted approximately as to the location of distilled spirits in bond and from my best calculations state that substantially half of the distilled spirits in the United States is now located in the Bonded Warehouses in the district of Kentucky and substantially half is now located in other States of the Union.

The prices of Bourbon whiskey and Rye whiskey and Brandies fluctuate in the market from time to time from various causes, including legislation, regulations, location, supply and demand; and according to whether such whiskey be in Distillery Bonded Warehouses where the privilege of bottling in bond is permitted or in such Bonded Warehouses where the privilege of bottling in bond is not permitted. Rye whiskies as a rule always have sold at a higher price per proof gallon than Bourbon whiskies of the same age. From my knowledge of the whiskey business and the prices quoted on Bourbon whiskies located outside of the State of Kentucky in distillery and general Bonded Warehouses, the price of such Bourbon whiskey, of substantially the same age, quality and kind as the product of the Imperial Distilling Company product of 1916, has been, for whiskey in distillery Bonded Warehouses where the bottling privilege exists, One Dollar and Ten Cents (\$1.10) to One Dollar and Twenty Cents (\$1.20) per gallon, and for the same products in general Bonded Warehouses where bottling in bond is not permitted, from Eighty-Five Cents (\$.85) to One Dollar (\$1.00) per original proof gallon in bond.

To enable the owners of whiskey located in Kentucky to compete, in the sale of warehouse receipts, with the owners of whiskey of the same class located outside of the State of Kentucky, it is and will be necessary for the owners of the Kentucky whiskey to accept upon the sale

of their commodity, as much less as this 50 cents tax will amount to.

I have dealt in past years and up to the present time extensively in distilled spirits known as Kentucky Bourbon whiskey. Prior to the passage of the so-called Vance Act in Kentucky approximately seventy-five per cent or more of the demand for whiskey in this and other markets was for such Kentucky Bourbon whiskey as compared with twenty-five percent demand for other Bourbon and Rye whiskies located outside of the State of Kentucky. Since the passage of the so-called Vance Act, the demand for Kentucky Bourbon whiskey stored in Kentucky, represents less than twenty-five per cent of the demand of the trade as compared with seventy-five percent or more of demand for similar grades of whiskey stored outside of Kentucky.

And further affiant saith not.

GEORGE R. LANDEN.

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**Motion of John J. Craig and Chas. I. Dawson to Dismiss  
Bill of Complaint—Filed May 14, 1920.**

The defendants, John J. Craig, Auditor of the Commonwealth of Kentucky, and individually, and Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, and individually, move the Court to dismiss the bill of complaint of the plaintiff herein, for the reason that plaintiff has an adequate remedy at law, and the bill does not state facts sufficient to support a cause of action against them, or either of them; and of this they pray the judgment of the Court.

CHAS. I. DAWSON,  
*Attorney General.*

**Affidavit of James Thompson**—Filed May 14, 1920.

The affiant, JAMES THOMPSON, being first duly sworn, on oath states :

I am a resident and citizen of Jefferson County, Kentucky, and have been for twenty years the President of the Glenmore Distilleries Company, in the Second District of Kentucky, engaged in the business of manufacturing and selling distilled spirits and the by-products resulting therefrom.

I am now and for years have been familiar with the cost of manufacturing distilled spirits, and especially such known as Bourbon whisky, and state that at the present time the cost of production of distilled spirits known as whisky, notwithstanding the abnormal high prices of the raw materials, grain, cooperage and labor, is about forty-five cents per gallon; and the carrying charges upon such whisky, until it is four years of age, the period at which distillers are permitted to bottle in bond, amount to approximately twenty-five cents per gallon.

I am familiar with the current market price of whiskies in bond generally with which distilled spirits known as whisky manufactured in Kentucky comes into direct competition, and such prices from various causes range from seventy-five cents to one dollar and twenty-five cents per original proof gallon on entry into bond.

I am also familiar with valuation placed upon whisky in bond in Kentucky by the Kentucky State Tax Commission, which Commission is charged with the duty, under the law of Kentucky, of valuing and assessing such distilled spirits known as whisky for state, county and city purposes; and the Kentucky State Tax Commission has for the last two years fixed and determined

the ad valorem value of whisky in bond in Kentucky at Twenty-five Dollars per barrel, containing approximately fifty gallons each.

I attach hereto as Exhibit 1 the original of the tax notice sent by the State Tax Commission through its official Secretary Ben Marshall, showing such assessment for the year 1919 on the assessment made as of September 1, 1918; and from my personal knowledge know that the same assessment was made as of September 1, 1919, for the year 1920, but I have misplaced the notice received, if, in fact, the official notice has been received.

Further affiant saith not.

JAMES THOMPSON.

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**Affidavit of John J. Craig—Filed May 14, 1920.**

The affiant, JOHN J. CRAIG, states that he is Auditor of Public Accounts of Kentucky, and one of the defendants named in the bill of complaint of plaintiff herein.

He says that it is insinuated in the bill in this case that he, as Auditor of Public Accounts, may attempt to exact an annual tax of fifty cents per proof gallon on all persons covered by the provisions of the Act of March 12, 1920, set out at length in the bill of complaint. He says that he is not attempting to claim that the license tax imposed therein is an annual license tax, but that the only claim that he asserts with reference to said tax is that it is paid only once, and that is to be made when the whiskey is removed from the bonded warehouse or transferred under bond to a bonded warehouse out of the State of Kentucky, and, regardless of the length of time the whiskey may have been in Kentucky in storage, the only tax exacted under this law is the fifty cents due and

payable at the time of removal or transfer, as above set out; that he has been advised by the Attorney General of the Commonwealth of Kentucky that this is the proper construction to be placed upon said act, and that he will be governed accordingly.

He further states that he does not believe it to be true that the act attacked in the bill of complaint in this case would result in prohibiting any of the businesses licensed by the said act, and he says this is especially true with reference to the character of business conducted by the plaintiffs in this case.

He says that since this bill has been filed he has made diligent inquiry for the purpose of ascertaining the prevailing market prices of whiskey when sold to the drug trade throughout the country, for the purpose of being sold by druggists at retail on prescription of physicians, as provided by Federal regulations, and that the price runs, in case goods, from over thirty dollars per case down to approximately twenty-two dollars and fifty cents per case, a case containing three gallons of whiskey, and that the prevailing price of whiskey in bulk runs from five dollars per proof gallon, for three-year old whiskey, up to approximately seven dollars per gallon for six and seven year old whiskey.

He files herewith as part hereof, as evidence of the market quotations on whiskey at the present time, the current price list issued by Crigler & Crigler, of Covington, to the trade, and also a price list issued by John D. Park & Son, under date of March 16, 1920.

He further states that at the present price of material and labor it costs \$4.20 per case to bottle and case a case of whiskey in quarts, a case containing three gallons. This is exclusive of the cost of the whiskey itself. Like-

wise, it costs \$4.70 to case a case of whiskey in pints, exclusive of the cost of the whiskey itself.

He says that the following is about the average charges on whiskey which must be paid and taken care of upon its removal from bond in Kentucky; Government tax, \$2.20 per gallon; State license tax, fifty cents per gallon freeing charge, which covers the natural wastage by evaporation, as ascertained on regauging, twenty-five per cent of its original cost; carriage charge, seven and one-half cents per gallon, per year, based on an original cost price of fifty cents.

JNO. J. CRAIG.

(SEAL)

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PRICE LIST.

Established 1874.

CRIGLER & CRIGLER.

Covington,

Kentucky.

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WOODLAND WHISKEY.

Bottled in Bond 100 Proof—Tax Paid.

12 Full Quarts,	\$26.00
24 Full Pints	\$27.00
48 Full Half Pints	\$27.50

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Quantity Discounts.

50 Cents per case less in 5 Case Lots.

\$1.00 per case less in 10 case lots.

\$1.50 per case less in 25 case lots or more.

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**WOODLAND WHISKEY.**

In Bulk Per Proof Gallon—Tax Paid.

Age.	Per Proof Gallon.
3 Years Old	5.00
4 Years Old	5.25
5 Years Old	5.50
6 Years Old	6.00
7 Years Old	6.50

Proof on above runs from 102 to 105 depending on age. Barrels contain between forty and forty-five gallons, depending on age.

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Terms: 1-2 Cash; Balance, draft bill of lading, attached when shipped by freight. When ordered shipped by express which is the quickest and safest way, Cash must be sent in advance for the full amount. All Shipments F O B Distillery. Prices subject to change without notice. No shipments made less than 2 cases or 5 gallons in bulk.

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**JOHN D. PARK & SONS CO., Ltd.**  
Liquor Department.

Wholesale Proprietary Medicines,  
Chemicals, Drugs, etc.

609 Mercantile Library Building.

Cincinnati, O., March 16, 1920.

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Mr. O. F. Baird,  
Louisville, Ky.

Dear Sir:

We have secured special concession for bottled in bond whiskey for medicinal purposes, and are now in position to quote greatly reduced prices as follows:

Single case lots,	\$26.00 (24 pints to the case)
5 case lots,	25.00
10 case lots,	24.00
25 case lots,	23.00
50 case lots,	22.00

We will furnish Old Taylor or Mellwood, two high grade well known brands.

In bulk will sell barrel lots, each barrel containing approximately 40 gallons, at \$5.00 per gallon, all taxes and charges paid, F. O. B. Cincinnati.

We can furnish Old Crow, Old Taylor, Blakemore or any popular brand. Goods guaranteed to be straight 100 proof.

Should you feel inclined to purchase warehouse certificates and have same tax paid yourself, we will furnish one barrel certificates in any quantity at the following prices:

Old Crow,	1.65
Mellwood,	1.50
Old Taylor,	1.65
Glenmore,	1.50
Blakemore,	1.50

These brands are from three to four years old.

Very truly yours,

John D. Park & Sons Co., Ltd.,

SF:H.

LIQUOR DEPARTMENT.

P. S. Advise you to buy now as the Kentucky Legislature has added an additional tax of 50 cents per gallon on whiskey which will again advance prices.

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**Affidavit of Elwood Hamilton—Filed May 14, 1920.**

The affiant, ELWOOD HAMILTON, states that he was on and prior to the sixteenth day of January, 1920, Collector of Internal Revenue of the United States for the District of Kentucky, and has been such collector at all times since said date, and as such Collector it is his duty to receive for the government of the United States all government tax due on distilled spirits within his district, and he has in his custody records showing the amount of whiskey sold and removed from government bonded warehouses in the District of Kentucky at all dates begin-

ning with the sixteenth day of January, 1920, and up to and including the present date.

He states that prior to the sixteenth day of January quite a quantity of liquor was removed from distillery bonded warehouses and stored in export bonded warehouses for the purpose of being bottled for export; and that a good deal of such whiskey so stored in export bonded warehouses was not removed prior to January sixteenth, and as a consequence a considerable quantity of such liquor has been sold for medicinal purposes from such export bonded warehouses since the sixteenth of January; but in the figures which are made part of this affidavit the liquor so removed from export bonded warehouses and which had been transferred there prior to the sixteenth day of January, 1920, is not included.

He states that beginning with the sixteenth day of January, 1920, and up to and including the last day of January, 1920, there was tax paid and removed from distillery bonded warehouses in Kentucky, 15,464.3 gallons of whiskey; that for the month of February, 1920, there was tax paid and removed from such bonded warehouses in Kentucky 121,226.6 gallons of whiskey; that from the first day of March, 1920, up to and including the eleventh day of March, 1920, on which date the Kentucky law imposing a license tax of fifty cents per gallon on whiskey became effective, there was tax paid and removed from such bonded warehouses in Kentucky, 140,152.7 gallons of whisky; that from the twelfth day of March, 1920, which, as stated above, was the date on which the Kentucky law imposing a license tax of fifty cents per gallon on whiskey became effective, up to and including the last day of March, 1920, there was tax paid and removed from such warehouses in Kentucky, 165,084.3 gallons of whis-

key; and that for the month of April, 1920, there was tax paid and removed from such bonded warehouses in Kentucky, 254,159.3 gallons of whiskey, and that the total amount which has been taxpaid and removed in Kentucky beginning with and including the twelfth day of March, 1920, and up to and including the last day of April, 1920, is 419,243.6 gallons, and that, as aforesaid, these figures do not embrace such liquor as was transferred from distillery bonded warehouses to export bonded warehouses under permit of the Government for bottling for exportation prior to the sixteenth day of January, 1920, and which still was left on hand in such warehouses on and after the sixteenth day of January, 1920.

He files herewith as part of this affidavit itemized, detailed statement, showing the number of gallons removed and tax-paid each day beginning with January sixteenth, 1920, and up to and including the last day of April, 1920.

ELWOOD HAMILTON.

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1920 Jan.	Gallons
16	579.7
17	431.2
19	1,482.5
20	740.0
21	1,586.5
22	371.3
23	594.2
24	166.4
26	1,443.7
27	417.8
28	1,618.1
29	1,526.5
30	4,506.4
<b>TOTAL</b>	<b>15,464.3</b>

*Affidavit of Elwood Hamilton*

Feb.	
2	1,483.5
3	3,095.6
4	6,798.1
5	5,133.4
6	2,164.0
7	4,730.7
9	1,983.0
10	2,442.0
11	2,396.3
12	2,948.0
13	8,628.6
14	3,658.7
16	6,413.2
17	4,740.0
18	3,915.7
19	3,199.0
20	8,112.6
21	6,767.1
24	10,843.9
25	12,263.3
26	9,320.0
27	10,179.9
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TOTAL	121,226.6

Mar.	
1	3,450.4
2	8,857.6
3	9,184.6
4	8,497.3
5	9,393.4
6	12,859.3
8	8,001.6
9	44,440.8
10	5,470.4
11	11,218.5
12	18,778.8
13	9,924.4
15	19,728.9
16	19,528.9
17	6,968.7
18	4,362.1
19	1,740.8
20	4,889.0

*Affidavit of Elwood Hamilton*

39

1920	Gallons
Mar.	
22	10,595.1
23	13,268.5
24	3,964.0
25	13,819.6
26	14,924.7
27	17,193.2
29	10,568.6
30	8,105.1
31	5,503.1

TOTAL	305,237.00
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Apr.	
1	14,607.9
2	6,373.8
3	10,307.3
5	10,064.9
6	13,198.2
7	14,175.5
8	11,883.0
9	9,214.8
10	7,909.7
12	8,755.8
13	4,595.9
14	7,312.5
15	6,240.4
16	11,595.1
17	7,425.2
19	4,611.3
20	6,006.3
21	6,831.5
22	11,786.2
23	6,275.7
24	12,662.7
26	8,909.9
27	13,043.2
28	17,554.5
29	12,392.5
30	10,425.9

TOTAL	254,159.30
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**Motion to Stay Proceedings—Filed May 14, 1920.**

Defendants, John J. Craig, Auditor of the Commonwealth of Kentucky, and individually, and Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, and individually, represent to the Court that there is now pending in the Franklin Circuit Court of Franklin County, Kentucky, a suit, wherein S. Rosenbloom & Company are the plaintiffs and E. H. Taylor, Jr. & Sons, John J. Craig, Auditor of the Commonwealth of Kentucky, and Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, are parties defendant; that said suit involves the validity of the Act of the General Assembly of the Commonwealth of Kentucky, approved March 12, 1920, referred to and embodied in the Bill of the plaintiffs in this case. They represent to the Court that said Franklin Circuit Court is a Court of original and general jurisdiction, and has jurisdiction both of the subject matter involved in said suit and of the person of these defendants, and of their co-defendant, E. H. Taylor, Jr. & Sons, and the said Court has jurisdiction under the laws of the Commonwealth of Kentucky to enforce the act attacked in the said proceeding and attacked in the proceeding in this case.

They state that there has been issued and served upon them in the case pending in the Franklin Circuit Court above referred to a temporary restraining order issued by the Clerk of the Franklin Circuit Court, enjoining and restraining these defendants and each of them from enforcing said act or its penalties, by suit or indictment or otherwise, until further orders of the Court. They state that it is their purpose to press to a final conclusion the litigation now pending in the Franklin Circuit Court as speedily as can be done, and they say that by virtue

of the said proceeding now pending in the Franklin Circuit Court, as above set out, under the provisions of Section 266 of the Judicial Code, proceedings in this Court should be stayed until the final determination of the said suit now pending in the Franklin Circuit Court.

They file in support of their motion a certified copy of the record of the suit now pending in the said Franklin Circuit Court.

WHEREFORE, they move the Court that it stay proceedings herein until the final determination of the suit now pending in the State Court aforesaid.

CHAR. L. DAWSON,

*Attorney General.*



**Transcript of Record in Case of Sol Rosenbloom vs. E. H. Taylor, Jr. & Sons (Inc.)—Franklin (Ky.), Circuit Court—Filed May 14, 1920.**

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Sol. Rosenbloom, trading as S. Rosenbloom  
& Company, Plaintiff,  
vs.  
E. H. Taylor, Jr. & Sons (Inc.), Defendant.

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**Petition in Equity.**

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The plaintiff, says that he is a wholesale liquor dealer located at Pittsburg, Penna., and a resident there trading and doing business under the name of S. Rosenbloom & Co., and in 1917 became the owner of several hundred barrels of distilled spirits—whiskey—by purchase from the defendant, E. H. Taylor, Jr. & Sons, a corporation organized under the laws of the State of Kentucky, and engaged in the manufacture of distilled spirits, to-wit: whiskey, and having its Home Office at Frankfort in Franklin County, Kentucky, with its distilling plant and warehouses situated in Woodford County, near Frankfort, Kentucky.

The plaintiff says that the warehouse certificates for said whiskey were delivered to him at the time of the purchase, but that the whiskey itself remained in the aforementioned warehouses. He says that about December, 1919, desiring to have certain of their said whiskey bottled in bond for export, to-wit: some two thousand (2,000) cases, they delivered to the defendant, warehouse receipts to cover that quantity of the barrel goods aforesaid, and after complying with all the regulations of the United States Revenue Laws affecting the removal and transfer of said goods in bulk under bond to another warehouse on the distillery premises, for bottling purposes, he caused the defendant to make such removal and upon such removal and transfer, to report to the Auditor of Public Accounts and pay into the Treasury of the Com-

monwealth of Kentucky, through said Auditor, the license tax of Two (2c) Cents on every proof gallon of said distilled spirits as was liable for taxation by the Federal Government, the quantity thereof being fixed and measured by the State Tax Commission. That said report and payment are shown in the report made in January, 1920.

The plaintiff says that while said whiskey was bottled in bond at a time when it could have been exported for beverage purposes, transportation could not be obtained in time for the shipment prior to January 16th, 1920, but said whiskey is yet entitled to be exported or used domestically for medicinal purposes.

That they have complied with all the government regulations concerning their right to sell and dispose of said whiskey, and with the necessary permits to do so, they have sold same for medicinal purposes and are entitled to its immediate possession for the purpose of shipment to the purchaser.

The plaintiffs say that for the purpose of having said bottled in bond goods shipped to the purchaser, they did on March 22nd, 1920, demand of the defendant the immediate possession of said two thousand (2,000) cases of whiskey and made preparations to load same on the cars at Taylorton, the railway station at the plant of the defendant, and had workmen at hand ready to engage in the work of loading same into cars procured for said purpose. That the defendant without right interfered with the work of its agents and servants in preparing to ship said goods and did so on the sold ground that a license tax of Fifty (50c) Cents on the gallon had been imposed on the whiskey of the plaintiffs by an Act of the General Assembly entitled

AN ACT imposing license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whiskey or brandy or other species of double stamp spirits in this State, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded ware-

housemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the taxes so collected, repealing all other license, franchise and excise taxes on the businesses covered by this Act; and declaring an emergency to exist."

And which Act was approved on March 16th, 1920, and became effective on that date, and for which tax the defendant claims it would be liable in the event said whiskey was subject to said tax.

That the defendant has refused to permit the plaintiffs, or their agents and servants, to load said whiskey on the cars prepared for its shipment as aforesaid, unless and until the plaintiffs should pay said tax or agree to reimburse it for its payment of same. And so the defendant continues to interfere with and prevent their agents and servants from doing said work.

The plaintiffs further charge that the bottled in bond whiskey named, having been transferred and removed once from the warehouse and the license tax of Two (2c) Cents per gallon having been paid, it cannot be subjected to further or other license tax, nor, as they are advised, can it be subjected under the terms of the Act of March 16th, 1920, to the Fifty-cent per gallon tax.

The plaintiffs say that the defendant is holding their whiskey without right and that they do not owe any further tax on the cases named.

They state that unless the defendant be enjoined and restrained from any further interfering with and preventing their agents and servants in the work of loading the plaintiff's whiskey on the cars, and preventing its delivery for shipment to the purchaser thereof, they will suffer great and irreparable injury, that no injunction herein has been applied for or refused by the Court or any Circuit Judge. He files herewith a copy of the Act of 1920, same not yet having appeared in printed form.

WHEREFORE, the plaintiffs pray that the defendant be enjoined from interfering with the plaintiffs, or his agents and servants in their work of taking possession of the two thousand (2,000) cases involved and loading same for shipment, and from further refusing the demand of the plaintiffs, for a mandatory order to defendant to

deliver said cases to the plaintiffs, and for all proper and appropriate relief.

HAZELRIGG & HAZELRIGG,  
*Attorneys for Plaintiff.*

Copy—

Attest:

Kelly C. Smither, C. F. C. C.

By

D. C.

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IN HOUSE,  
REGULAR SESSION, 1920.

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HOUSE BILL No. 513.  
THURSDAY, FEBRUARY 26, 1920.

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Mr. Vance introduced the following bill, which was ordered to be printed and referred to the Committee on Revenue and Taxation, viz.:

AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whiskey or brandy or other species of double stamp spirits in this state, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the taxes so collected; repealing all other license, franchise and excise taxes on the businesses covered by this Act; and declaring an emergency to exist.

*Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

1. Every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits, known as whiskey or brandy or other species of double stamp spirits, in this state; and every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale or for any other purpose, shall pay an annual license tax to the Commonwealth of Kentucky of fifty cents on every proof gallon of said distilled spirits so manufactured or stored in a bonded warehouse, or withdrawn from a bonded warehouse, or transferred therefrom under bond out of the Commonwealth of Kentucky.

2. Every corporation, association, partnership and individual owning, controlling or operating a bonded warehouse in this state, wherein distilled spirits known as whiskey or brandy or other species of double stamp spirits are stored, shall, on or before the first day of June, 1920, on blanks furnished by the Auditor of Public Accounts, report to the Auditor of Public Accounts the total amount of such spirits stored in a bonded warehouse owned, controlled or operated by such corporation, association, partnership or individual; and shall make monthly report to the Auditor of Public Accounts thereafter, which reports must be signed and sworn to by such persons, or in case of a corporation, association or partnership, by some officer or person authorized to make such oath. The first report provided for herein shall show the number of proof gallons of such spirits withdrawn from said warehouse from the date this Act becomes effective to the date of making such report; and each monthly report thereafter shall show the number of proof gallons placed in said bonded warehouse since the date of making the last preceding report, the number of proof gallons withdrawn or transferred since the date of making the last preceding monthly report, and the aggregate number of gallons on hand at the date such report is made. In all cases where such spirits are transferred under bond from one bonded warehouse in this Commonwealth to another, said report shall show the warehouse from which same has been transferred and the

warehouse to which same has been transferred, the quantity thereof and the serial number of each of the packages so transferred.

3. Every person, corporation, association or partnership operating, owning or controlling such bonded warehouse, shall, at the time said reports herein provided for are made, pay to the Auditor of Public Accounts the tax of fifty cents per proof gallon upon each proof gallon of such spirits removed from the warehouse owned, controlled or operated by such person, corporation, association or partnership, or transferred under bond out of this state, up to the date of making such report; and for the purpose of securing the payment of the license taxes herein provided for, the Commonwealth shall have a lien on all such spirits stored in such bonded warehouses, together with the other property of the bonded warehouseman used in connection therewith; and in all cases where the spirits so removed or transferred were owned or controlled by another than the bonded warehouseman, then the bonded warehouseman shall collect and pay the tax due on such spirits so removed or transferred under bond, and shall be subrogated to the lien of the Commonwealth.

4. Every corporation, association, partnership and individual engaged in distilling spirits known as whiskey or brandy or other species of double stamp spirits in this state, shall pay the license tax herein provided upon all such spirits so manufactured and removed from the premises without being placed in a bonded warehouse at the date of the removal of such spirits; and all such corporations, associations, partnerships and individuals engaged in the business of distilling such spirits in this state shall file monthly statements with the Auditor of Public Accounts, on blanks to be furnished by the Auditor, which statements must be sworn to and which statements shall show the number of proof gallons of such spirits so distilled and removed from the premises without having been stored in a bonded warehouse, and at the time of filing such statements shall pay to the Auditor of Public Accounts the amount due on such spirits so manufactured and removed; and for the payment of the taxes due under this provision, the Commonwealth shall have a lien upon all the machinery and the premises and the manufactured spirits made thereon, of the corporation, association, partnership or individual engaged in such distilling business.

5. Every person, corporation, association or partnership failing to make the reports herein provided for, in the manner herein provided for, and failing to pay the taxes as they become due, as herein provided for, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred dollars nor more than one thousand dollars, and each day after the date such report is due that such person, corporation, association or partnership is in default shall be treated and considered as a separate offense.

6. The tax herein provided for, when collected, shall be distributed as follows: To the State Road Fund, sixty-five per cent thereof; to the General Expenditure Fund, thirty-five per cent thereof.

7. The license tax herein imposed shall be in lieu of all other license, franchise or excise taxes now imposed by law on persons, corporations, partnerships or associations engaged in business covered by this Act; and all Acts in conflict therewith are hereby repealed, and especially there is hereby repealed Chapter 5 of the Acts of the Special 1917 Session of the General Assembly of Kentucky.

8. Whereas, many persons, corporations, association and partnerships are now engaged in the business covered and licensed by this Act, without paying an adequate license tax to the Commonwealth of Kentucky therefor; and whereas, the liquor which they are handling and in which they are dealing is constantly in large quantities being removed from the bonded warehouses and disposed of, without the state securing an adequate license tax thereof, an emergency is hereby declared to exist, and this Act shall take effect from and after the date of its passage and approval by the Governor.

Copy—

Attest:

Kelly C. Smither, C. F. C. C.

By

D. C.



## FRANKLIN CIRCUIT COURT.

S. Rosenbloom &amp; Company,

Plaintiffs,

vs.

E. H. Taylor, Jr. &amp; Sons (Inc.),

Defendants.

**Answer.**

The defendant, E. H. Taylor, Jr. & Sons (Inc.), for its answer herein admits that it is a corporation organized under the laws of Kentucky, and at all the times mentioned in the petition was engaged in the business of manufacturing distilled spirits known as whiskey, with distilling plant and warehouses situated in Woodford County, Ky., and home office at Frankfort, Ky. The defendant further admits that the plaintiffs in 1917 were the owners of several hundred barrels of whiskey purchased by it of the defendant, and which were stored in bulk in barrels in the warehouses of the defendant, warehouse certificates for which were issued and delivered to the plaintiffs.

That on October 14th, 1919, the defendant received directions from the plaintiff to bottle in bond for them one hundred and eighty-five (185) barrels and one hundred (100) barrels of their said whiskey, designating the serial numbers thereof, for the purpose of exporting same from the United States, and directed the defendant to pay all the taxes due thereon, State and County, and the special tax of two (2c) cents on the gallon thereof, and thereupon the defendant transferred said barrels of whiskey under bond, or removed them into the bottled in bond warehouse in order to bottle same in bond, and as directed, paid the County and State taxes thereon for the plaintiff including the sum due the State for the two-cent tax amounting to \$148.68, being the special tax on the 185 barrels, and the sum of \$79.12, being the said two cents on the gallon, special tax, on the 100 barrels, and which sums were paid to the State of Kentucky, as shown



on its January 1st, 1920, report to the Auditor of Public Accounts, together with other payments of a like character. It files herewith a statement of the transactions with respect to the 185 and 100 barrels, and which include the cases named in the petition as ordered for medicinal purposes, and of the detention of which complaint is made in the petition.

That for further answer, it denies that the plaintiff is entitled to the immediate possession of the two thousand (2,000) cases named in its petition.

That under the Act of the General Assembly approved March 16th, 1920, and entitled as set out in plaintiff's petition, a copy of which is filed therewith, a tax of fifty (50c) cents on each proof gallon is levied on each owner of such whiskies, engaged in the business of owning and storing such spirits in bonded Warehouses in this State, and in removing same therefrom for the purpose of sale, or for any other purpose, and that the plaintiff is so engaged and his said two thousand (2,000) cases so stored as set out in his petition, and same are apparently liable to the said fifty-cent tax, and for which tax the defendant, as warehouseman, is also liable if it permits a removal thereof unless said spirits are tax paid. And for this reason defendant admits it is interfering and preventing such removal as set out in the petition.

The defendant is informed that aside from the question of construction of the Act, that there may be a question as to the validity of said tax, and to protect itself as far as may be, submits that it is entitled to hold said whiskey until that question is determined by some Court of competent jurisdiction.

WHEREFORE, it prays to be dismissed with its costs and for all proper relief.

C. C. TURNER,

*Attorney for Defendant.*

FRANKLIN CIRCUIT COURT.

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S. Rosenbloom & Company,

Plaintiffs,

vs.

E. H. Taylor, Jr., & Sons,

Defendants.

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**Reply and Cross-petition.**

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1. For reply the plaintiff denies that the two thousand cases of whiskey herein are liable to the said fifty-cent tax, and for which tax the defendant, E. H. Taylor, Jr., & Sons, is liable if it permits a removal thereof unless said spirits are tax-paid.

2. The plaintiff admits that the whiskey involved herein is under the terms of the Act mentioned and set out by the defendant in its answer, apparently liable to the fifty-cent tax imposed by that Act, but the plaintiff says the said Act of the General Assembly of Kentucky, approved March 16th, 1920, and entitled:

“AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whiskey or brandy or other species of double stamp spirits in this State, and upon every corporation, association partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the taxes

so collected; repealing all other license, franchise and excise taxes on the business covered by this Act; and declaring an emergency to exist."

is unconstitutional and an illegal and unlawful exaction and unlawful exercise of Legislative power.

That it is a revenue measure purely though raised by a license tax and is confiscatory in its character and sense, and imposes a tax wholly out of proportion to the value of the license conferred and of the article taxed, and said exaction is beyond the limits of any reasonable profit derivable from the manufacture and sale of the article taxed, or the cost of regulation and licensing such manufacture and sale. That the basic commercial value of whiskey generally is about One Dollar per gallon.

That said Act violates the constitution of the State of Kentucky, and particularly Section 171 and 172 thereof requiring uniformity of taxation within the territorial limits of the authority imposing the tax.

That said tax is discriminatory in its nature and adds a greater burden on whiskey than on other personal property, and property of like value, and on business and occupations of equal and like character and value, and no such confiscatory or discriminatory tax is imposed on owners or holders of similar property in other states and who are competitors with plaintiff in the business named.

That an enforcement of said Act will result in taking private property for public purposes without just compensation and without due process of law, and deprives the owners of such property and warehousemen in charge thereof the equal protection of the law in violation of the 14th Amendment of the Constitution of the United States.

That the defendant, John J. Craig, is the Auditor of Public Accounts in and for the Commonwealth of Kentucky and is charged with the duty of requiring the reports provided for under said Act, and further charged on behalf of the State with the collection of said tax, and is threatening to and is about to collect same by requiring said reports and subjecting the plaintiff to indictment and heavy fines and penalties for failing to report and pay said tax as provided in said Act, and is threatening to institute civil actions as well to require said reports and enforce said collection, and said Craig has demanded of the plaintiff, as well as of the defendant, the payment

of said tax on the whiskey in question, and which tax the plaintiff admits the defendant, E. H. Taylor, Jr., & Sons, is likewise liable for under the terms of said Act. That the said defendant, Craig, as Auditor, has warned the plaintiff, and presumably the defendant, that if said whiskey is removed from the warehouse where it is now stored they will be proceeded against forthwith for the collection of said tax, and the enforcement of the penalties imposed by the Act.

That Honorable Chas. I. Dawson is the Attorney General of the Commonwealth of Kentucky, and he head of its legal department, and charged with the duty of enforcing said Act of March 16, 1920, and is threatening to enforce same, and the penalties therein provided, and will do so unless enjoined.

The plaintiff charges that the defendants, John J. Craig, as Auditor aforesaid, and Charles I. Dawson, Attorney General, are the proper and necessary parties hereto, and this Court is asked that they be made such parties and that process of this Court be issued against them, and they are now made such parties and process is asked against them. That the Hon'ble Robt. L. Stout is now absent from this city and that no injunction herein against the prosecution of this action has been refused by the Court or other Circuit Judge.

The plaintiff says that unless the defendants, Chas. I. Dawson, Attorney General, and John J. Craig the defendants are made parties hereto, and are immediately enjoined and restrained from enforcing said Act of March 16, 1920, and from requiring the plaintiff and the defendant, E. H. Taylor, Jr., & Sons, from reporting and paying the taxes on said whiskey the plaintiff will suffer great and irreparable injury, and especially so from the delay in giving notice of this application and plaintiff has no remedy at law available to him to prevent said injury and wrong.

WHEREFORE the plaintiff prays that Chas. I. Dawson, Attorney General, and the said John J. Craig, Auditor aforesaid, be made parties defendants hereto on behalf of the Commonwealth of Kentucky, and that said cross-defendants be enjoined and restrained from requiring said reports of said whiskey to be made and from collecting the said fifty-cents per gallon tax thereon, and from enforcing the provisions of the Act of March 16, 1920, and that the plaintiff be allowed to remove his whis-

key without the payment of said tax and that said Act of March 16th, 1920, be held to be invalid and unconstitutional, and for judgment for costs and all proper relief.

HAZELRIGG & HAZELRIGG,  
For Plaintiffs.

STATE OF KENTUCKY, }  
COUNTY OF FRANKLIN. } SCT:

Affiant, J. H. Hazelrigg, says that he is the attorney of plaintiff, S. Rosenbloom & Company, who is absent from this county and that the statements of the foregoing Reply and Cross-Petition are true.

J. H. HAZELRIGG.

Subscribed and sworn to before me by J. H. Hazelrigg, this 8th day of May, 1920.

KELLY C. SMITHER.

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FRANKLIN CIRCUIT COURT.

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S. Rosenbloom & Company,	Plaintiffs,
vs.	
E. H. Taylor, Jr., & Sons, (Inc.), etc.,	Defendants.

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**Amended Petition.**

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The plaintiff for amendment to his original petition says that the Act of the General Assembly of Kentucky, approved March 16th, 1920, and entitled:

"AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whiskey or brandy or other species of double stamp spirits in this State, and upon every corporation, association, partnership and

individual engaged in the business of owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the taxes so collected; repealing all other license, franchise and excise taxes on the business covered by this Act; and declaring an emergency to exist,"

is unconstitutional and an illegal and unlawful exaction and unlawful exercise of legislative power.

That it is a revenue measure purely though raised by a license tax and is confiscatory in its character and sense, and imposes a tax wholly out of proportion to the value of the license conferred and of the article taxed, and said exaction is beyond the limits of any reasonable profit derivable from the manufacture and sale of the article taxed, or the cost of regulation and licensing such manufacture and sale. That the basic commercial value of whiskey generally is about One Dollar per gallon.

That said Act violates the constitution of the State of Kentucky, and particularly Sections 171 and 172, thereof requiring uniformity of taxation within the territorial limits of the authority imposing the tax.

That said tax is discriminatory in its nature and adds a greater burden on whiskey than on other personal property, and property of like value, and on business and occupations of equal and like character and value, and no such confiscatory and discriminatory tax is imposed on owners or holders of similar property in other states and who are competitors with plaintiff in this business named.

That an enforcement of said Act will result in taking private property for public purposes without just compensation and without due process of law, and deprives the owners of such property and warehousemen in charge thereof the equal protection of the law in violation of the 14th Amendment of the Constitution of the United States.

That the defendant, John J. Craig, is the Auditor of Public Accounts in and for the Commonwealth of Ken-

tucky and is charged with the duty of requiring the reports provided for under said Act, and further charged on behalf of the State with the collection of said tax, and is threatening to and is about to collect same by requiring said reports and subjecting the plaintiff to indictment and heavy fines and penalties for failing to report and pay said tax as provided in said Act, and is threatening to institute civil actions as well to require said reports and enforce said collection, and said Craig has demanded of the plaintiff, as well as of the defendant, the payment of said tax on the whiskey in question, and which tax the plaintiff admits the defendant, E. H. Taylor, Jr., & Sons, is likewise liable for under the terms of said Act. That the said defendant, Craig, as Auditor, has warned the plaintiff, and presumably the defendant, that if said whiskey is removed from the warehouse where it is now stored they will be proceeded against forthwith for the collection of said tax, and the enforcement of the penalties imposed by the Act. That Honorable Charles I. Dawson, is the Attorney General of the Commonwealth of Kentucky, and the head of its legal department and charged with the duty of enforcing said Act of March 16th, 1920, and is threatening to enforce same and the penalties therein provided by civil actions and by indictments and other criminal proceedings and will do so unless enjoined.

The plaintiff charges that the defendants, John J. Craig, as Auditor aforesaid, and defendant, Charles I. Dawson, Attorney General, are proper and necessary parties hereto, and this Court is asked that they be made such parties and that process of this Court be issued against them, and they are now made such parties and process is asked against them. That the Honorable Robert L. Stout, Circuit Judge of this County, is now absent from this county and that no injunction herein against the prosecution of this action has been refused by this court or other Circuit Judge.

The plaintiff says that unless the defendants, Charles I. Dawson, Attorney General, and John J. Craig, Auditor, are made parties hereto, and are enjoined and immediately restrained from enforcing said Act of March 16th, 1920, and from requiring the plaintiff and the defendant, E. H. Taylor, Jr., & Sons, from reporting and paying the taxes on said whiskey the plaintiff will suffer great and irreparable injury and especially so from the delay arising in giving notice of this application, and plaintiff

has no remedy at law available to him to prevent said injury and wrong.

WHEREFORE, the plaintiff prays that Charles I. Dawson, Attorney General, and said John J. Craig, Auditor aforesaid, be made parties defendants hereto on behalf of the Commonwealth of Kentucky, and that said cross-defendants be enjoined and restrained from requiring said reports of said whiskey to be made and from collecting the said fifty-cent per gallon tax thereon, and from enforcing the provisions of the Act of March 16th, 1920, or its penalties by civil actions or by indictments or otherwise, and that the plaintiff be allowed to remove his whiskey without the payment of said tax and that said Act of March 16th, 1920, be held to be invalid and unconstitutional, and for judgment for costs and all proper relief.

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*For Plaintiff.*

State of Kentucky, }  
Franklin County. }   Sct.

Affiant, J. H. Hazelrigg, says that he is the attorney for plaintiff, S. Rosenbloom & Company, who is absent from the county and that the statements of the foregoing amended petition are true.

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Subscribed and sworn to before me by J. H. Hazelrigg  
this 12 day of May, 1920.

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F. C. C.



## FRANKLIN CIRCUIT COURT.

S. Rosenbloom &amp; Company,

Plaintiffs,

vs.

E. H. Taylor, Jr., &amp; Sons, (Inc.), etc.,

Defendants.

**Temporary Restraining Orders.***The Commonwealth of Kentucky,*

To defendants, Charles I. Dawson, Attorney-General and John J. Craig, Auditor of Public Accounts of the State of Kentucky:

You are hereby enjoined from requiring from the plaintiff or his agents or distiller in charge, payment of the fifty-cent per gallon license tax on his whiskies described in the petition and stored in bond in the Old Taylor warehouses in Woodford County, Kentucky, and which tax is attempted to be imposed thereon under an act of the General Assembly, approved March 16th, 1920, and from enforcing said act or its penalties by suit or indictment or otherwise, until the further orders of the court.

Witness, KELLY C. SMITHER, Clerk of the Franklin Circuit Court this 12th day of May, 1920.

KELLY C. SMITHER,  
F. C. C.

FRANKLIN CIRCUIT COURT.

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S. Rosenbloom & Company, Plaintiffs,  
vs.  
E. H. Taylor, Jr., & Sons, (Inc.), etc., Defendants.

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**Order Granting Temporary Restraining Order.**

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This day came the plaintiffs, S. Rosenbloom & Company, and on their motion a temporary restraining order is granted them, according to the prayer of their amended petition and reply and cross-petition upon their executing bond conditioned according to law, in the penalty of two thousand dollars; whereupon said plaintiffs with United States Fidelity & Guaranty Co. as their surety entered into and acknowledged bond to the defendant, John J. Craig, Auditor and defendant, C. I. Dawson, Attorney General, as required by this order, which is approved and filed.

This May 12th, 1920.

KELLY C. SMITHER,  
*Clerk F. C. C.*

I, Kelly C. Smither, Clerk of the Franklin Circuit Court, certify that the foregoing is a full, true and correct copy of all the pleadings filed and orders made, and returns thereon, in the Franklin Circuit Court, in the case wherein S. Rosenbloom & Company are the plaintiffs and E. H. Taylor, Jr. & Sons, Incorporated, and John J. Craig, Auditor of Public Accounts of the Commonwealth of Kentucky, and Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, are the defendants, as appears of record in my office.

Witness my hand and seal, this the 13th day of May, 1920.

KELLY C. SMITHER,  
*Clerk Franklin Circuit Court.*

I, Robert L. Stout, Judge of the Franklin Circuit Court, certify that Kelly C. Smither is the duly elected, qualified and acting Clerk of the Franklin Circuit Court, and that the signature to the above certificate is the genuine signature of said Kelly C. Smither, and the seal attached thereto the seal of the Franklin Circuit Court, and that said certificate and attestation of said clerk is in due form of law.

WITNESS my hand as Judge of the Franklin Circuit Court, this the 13th day of May, 1920.

ROBT. L. STOUT,  
*Judge Franklin Circuit Court.*

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**Separate Answer of John J. Craig, Auditor of the Commonwealth of Kentucky and Individually, and Charles I. Dawson, Attorney General of the Commonwealth of Kentucky and Individually—Filed May 14, 1920.**

The defendants, John J. Craig, Auditor of the Commonwealth of Kentucky, and as an individual, and Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, and as an individual by way of answer and defense herein says that the bill in this case is without equity because the plaintiff has an adequate remedy at law and in this respect they show the Court that Section 162 of Kentucky Statutes provides as follows:

“When it shall appear to the Auditor that money has been paid into the Treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the Treasury for such money so improperly paid, in behalf of the person who paid the same. Nothing herein contained shall authorize the issuing of any such warrant in favor of any person who may have made payment of the revenue tax due on any tract of land, unless it is manifest that the whole of the tax due, the Commonwealth on such land has been paid,

independent of the mistaken payment, and ought to be reimbursed."

They state that under the provision of this Act as interpreted by the Court of Appeals of Kentucky, the Court of last resort in this State, the plaintiff would be entitled to receive from the Auditor of Public Accounts of Kentucky any taxes he may be required to pay under the provisions of the Act which attacked in the Bill of Complaint in this proceeding, should it be determined that the said Act is unconstitutional or that the tax exacted thereunder was not due.

Further answering they say that they have no information as to the truth of the allegations contained in paragraph I of the Bill of Complaint as to the said J. and A. Freiberg Company being a corporation created and organized under and pursuant to the laws of the State of Ohio. They have no information as to the truth of the allegation contained in said paragraph I of the Bill that the plaintiff is a citizen of the state of Ohio and not a citizen of the state of Kentucky.

They say that they have no information of the truth of the allegation in the Bill of Complaint as contained in paragraph I thereof that the matter or amount in dispute in this case exceeds the value of \$3,000.00 exclusive of interest and costs.

They say that they have no information of the truth of the allegation contained in paragraph 3 of the Bill of Complaint to the effect that the plaintiff more than three years ago to-wit, in October, 1916, purchased from T. E. O'Keefe, proprietor of the Imperial Distillery No. 8 Central District of Kentucky, located at Stanley, Kentucky, the amount or character of distilled spirits set forth in said paragraph of the bill of complaint and they

say that they have no information as to the truth of the allegation contained in said paragraph that the said plaintiff is now the owner of said spirits stored in general bonded warehouse No. 1, Fifth District of Kentucky, operated by the Louisville Public Warehouse Company, the defendant herein.

They say that they have no information as to the truth of the allegation contained in paragraph 4 of the bill of complaint to the effect that on the 22nd day of April, 1920, the plaintiff directed the Louisville Public Warehouse Company to remove the distilled spirits referred to in the bill of complaint from its General Bonded Warehouse for the purpose of shipment of same in bond to General Bonded Warehouse No. 2 situated at Boston, Massachusetts, the proprietor of which is the Quincy Market and Cold Storage Warehouse Company; and they have no information as to the truth of the allegation therein contained that at the time of giving such directions to the Louisville Public Warehouse Company, the plaintiff made tender of all the charges and taxes legally due against said whiskey.

By way of answer to paragraph 7 of the bill of complaint, these defendants deny that the plaintiff is not now engaged in any occupation or business in the Commonwealth of Kentucky in or about or in connection with the whiskey described in the bill of complaint; and they deny that the plaintiff does not propose to do any business or make any sales of its whiskey in Kentucky. They say that it is true that there is a wastage by leakage and evaporation of distilled spirits in bond as alleged in paragraph 8 of the Bill of Complaint and that said wastage and leakage can only be stopped by bottling said liquor and that liquor cannot be bottled in bond under the law of the United States while contained in a general bonded

warehouse but they deny that before the said whiskey can be bottled in bond the 50 cents occupation tax provided for in the law which is attacked in the Bill of Complaint must be paid; but they say that so long as the liquor remains in bond in Kentucky, the tax asserted by the Commonwealth of Kentucky in the law attacked in the Bill of Complaint does not become due notwithstanding same may have been transferred from one bonded warehouse to another; and they deny that the plaintiffs cannot transfer the liquor referred to in the Bill of Complaint to a warehouse for bottling without paying the assessment of 50 cents per proof gallon provided for in the law attacked in the Bill of Complaint.

They deny that there is now in bonded warehouses elsewhere than in the State of Kentucky but within the United States distilled spirits known as whiskey in an amount exceeding 50 per cent of such spirits in bond in the United States and they deny that such spirits in bond are sufficient to supply all demands of the trade for which such spirits are saleable for a period of many years or for a period exceeding five years.

They say they have no information as to the truth of the allegation in said paragraph 8 in the Bill of Complaint that there is in the United States and outside of the State of Kentucky, one large distillery now operated for the manufacture of distilled spirits known as whiskey, nor have they information as to the proof of the allegation contained in said paragraph of the Bill of Complaint that other large distilleries located outside of the State of Kentucky but in the United States have declared their intention of and are preparing to engage in the manufacture of distilled spirits known as whiskey.

They have no information as to the truth of the allegation contained in said paragraph of the Bill of Com-

plaint that such alleged new production of distilled spirits known as whiskey will supply the demand therefor at a price far below the cost and carrying charges of the plaintiff upon its whiskey if the plaintiff's whiskey is subjected to the tax of 50 cents per proof gallon claimed by defendants herein on behalf of the Commonwealth of Kentucky.

The defendants deny that the price or value in bond of whiskey of the character in suit in this case is approximately \$1.00 per proof gallon or that such price varies from 70 cents to \$1.00 per proof gallon or that the plaintiff is in direct competition with others engaged in similar business in the sale of such distilled spirits known as whiskey at said price.

They have no information as to the truth of the allegation contained in paragraph 8 of the Bill of Complaint that there are large quantities of distilled spirits known as whiskey of Kentucky production in bond outside of the State of Kentucky with which distilled spirits plaintiffs' above described whiskey must come in competition for ultimate sale. They deny that for the defendants or the Commonwealth of Kentucky to levy or collect in the form of license tax or otherwise a tax at the rate of 50 cents per proof gallon upon plaintiff's distilled spirits known as whiskey, would be to destroy and confiscate the plaintiff's property or would result in depriving plaintiff of its property.

They disclaim any intention of claiming or attempting to claim from the plaintiff or from any other person affected by the provisions of this act a tax of 50 cents per proof gallon for each year the said liquor may be in storage but they state that the said law does not contemplate but one payment of the license tax of 50 cents per proof gallon, this to be paid when the liquor is released from

bond or transferred under bond out of the state; and the tax of 50 cents per proof gallon when so paid is full satisfaction of the license tax asserted by the Act in controversy regardless of the length of time the said liquor may have been manufactured or in storage.

Answering paragraph No. 9 of the Bill of Complaint, they deny that the assessment for the collection by any process of means of a license tax of 50 cents per proof gallon upon plaintiff's distilled spirits, known as whiskey, would be taking plaintiff's property or depriving plaintiff of its property without due process of law or would deny the plaintiff the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States.

They deny that the said license tax or the accompanying lien created upon plaintiff's property by reason of said tax violates the Thirteenth or the Fourteenth Section of the Bill of Rights of the Constitution of Kentucky or that as a license tax, it is so enormous or confiscatory upon the business or occupation of owning and storing whiskey in bond, that it is prohibitive or a useful or legitimate occupation or destructive thereof, or that it is invalid under the constitution of the State of Kentucky or that the said tax or the Act attempting to create said tax, are in violation of the tax provision of the Constitution of the State of Kentucky or that same is void.

They deny that unless restrained and enjoined by this court, the defendants herein, or that the defendant, the Louisville Public Warehouse Company, will engage in a multiplicity of suits involving plaintiff's property for the penalties continually accruing or to accrue for the violation of the Act aforesaid or that plaintiff, or plaintiff's property, will be subjected to a multiplicity of suits,



lines or liabilities against which plaintiff will have no adequate remedy at law or any remedy at law for the protection of plaintiff's rights or the preservation or enjoyment of its property aforesaid.

They deny that plaintiff has no adequate remedy at law.

They deny that plaintiff will be subjected to great or irreparable injury or any injury unless this Court should interfere by injunctive process to restrain the enforcement or collection of said claim for taxes or penalties.

Therefore, premises considered, defendants ask that the plaintiff take nothing by its petition, and further pray for their costs and all proper and equitable relief.

CHARLES I. DAWSON,



*Attorney.*

Affiant, Charles I. Dawson, states that he is the Charles I. Dawson mentioned in and made a party defendant to the Bill of Complaint in this cause and that he believes the statements of the foregoing Answer are true.

CHARLES I. DAWSON.

Subscribed and sworn to before me by Charles I. Dawson, this 14th day of May, 1920.

LILLIAN G. DAVIS,

*Notary Public, Jefferson County, Ky.*

(SEAL)

My commission expires Aug. 6, 1923.

**Motion of Louisville Public Warehouse Company to Dismiss Bill**—Filed May 14, 1920.

Comes the defendant, Louisville Public Warehouse Company, by counsel and respectfully moves the Court to dismiss this bill of complaint because it states facts insufficient to constitute a valid cause of action in equity.

WM. OVERTON HARRIS,

*Att'y. for Louisville Pub. Warehouse.*

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**Affidavit of J. P. Meehan**—Filed May 14, 1920.

Affiant, J. P. MEEHAN, states that he is now and was on and prior to the 16th day of January, 1920, and has been at all dates since said time, the agent in charge of the office of the American Railway Express Company at Frankfort, Kentucky, said express Company being a common carrier engaged in hauling and carrying freight for hire.

He states that there are in Frankfort five distillery bonded warehouses, wherein there is stored whiskey; that under the law he is required to keep a record in his office of each shipment of intoxicating liquors known as whiskey made through his office over the line of the American Railway Express Company; that said record must show the date of shipment, the quantity of whiskey so shipped, the name of the consignor and his address, the name of the consignee and his address, and also the number of the government permit authorizing the sale and shipment of said whiskey.

He states that from the 16th day of January, 1920, up to and including the 31st day of January, 1920, there were

shipped upon Federal sale permits from Frankfort, Kentucky, and through the office of the American Railway Express Company, a total of 134 cases of whiskey, and of 16 barrels of whiskey, making a total in all of 1037.27 gallons shipped through the said office for said month; that his records show that for the month of February, 1920, there were shipped under Federal sale permits through the said office over the lines of the American Railway Express Company 1333 cases of whiskey, and 321 barrels of whiskey, making a total for said month of 16626.04 gallons; that for the month of March, 1920, up to and including the 11th day of March, 1920, his records show that there were shipped through his office from Frankfort, Kentucky, under Federal sale permits 494 cases of whiskey and 156 barrels of whiskey, making a total of shipments in March up to and including March 11th, of 7587.53 gallons; that from the 12th day of March, 1920, which was the first day upon which the fifty cent license tax imposed by the last session of the General Assembly became effective, up to and including the 31st day of March, 1920, there were shipped through his office upon Federal sale permits 1610 cases and 227 barrels of whiskey, or a total for said last named period of 14209.41 gallons; that for the month of April, 1920, his records show that there were shipped through his office upon Federal sale permits 6333 cases and 202 barrels of whiskey, making a total for said month of 25658.37 gallons; that for the month of May, up to and including the 12th day of May, the records in his office show that there were shipped through said office upon Federal sale permits 2170 cases and 196 barrels of whiskey, or a total for said last named period of 14805.41 gallons.

That of all the quantity of whiskey shipped during the period above referred to through the office of the

American Railway Express Company at Frankfort, Kentucky, only two very small shipments were shipped to Kentucky; that the balance of said whiskey was shipped to various parts of the United States, some going to Massachusetts, some to Illinois, some to New York, some to Pennsylvania, some to Wisconsin, some to New Jersey, some to Missouri, some to Ohio, some to Texas and some to Kansas, the bulk of same, however, going to New York, Illinois, Pennsylvania and Ohio, the respective quantities being in the order of the last States named.

He states that the quantity shipped for April, 1920, is considerably smaller than it would have been but for the fact that from the 13th till the 22nd day of April there was an absolute embargo on whiskey shipments, and he was compelled to and did refuse application for shipment of a great deal of whiskey during said period of time.

He states that since the 12th day of March, 1920, the quantity of whiskey being shipped through his office was in excess of shipments for any corresponding period of the year 1919, except for the month of June, 1919.

He further states that his office is located near to the freight office of the Railroad Company passing through Frankfort, and that he has opportunity to and has observed shipments of whiskey made through the freight office, and he knows it to be a fact that large quantities of whiskey have been shipped during the period covered and referred to in this affidavit, by freight; however, the amount of same he is unable to state.

He states that a great deal of the whiskey referred to in this affidavit as being shipped through his office was shipped in carload lots, the express car being placed at the loading point of the respective distilleries, and this affiant would in many instances be in charge of the car

while same was being loaded. In this way he was in a position to observe and know something of the magnitude of business being conducted by the distilleries, in addition to that passing through his office; and he says that during the period referred to in this affidavit he believes it to be true that large quantities of whiskey have been shipped from the distilleries at Frankfort by truck to points out of the State and that to him it appears that the problem has been, not to find a market for the whiskey but to find adequate means of transporting same to the market.

J. P. MEEHAN.

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**Affidavit of P. H. Leatherwood—Filed May 14, 1920.**

The affiant, P. H. LEATHERWOOD, states that he is now and has been since August 22nd, 1919, the regularly appointed and acting express agent for the American Railway Express Company in Maysville, Kentucky.

The states that all liquor shipments by express from and through the Maysville Express Office from March 11th to May 8th, inclusive, of this year has been made by the two local distillors, J. H. Rogers & Co. and H. E. Pogue Distillery Co. and consigned to points outside of the State of Kentucky. He states such shipments, during said time, aggregate Six Thousand and Ninety-two gallons (6092) of whisky as shown by the records of his office in his charge, possession, custody and control which he knows to be absolutely correct as shown by a true itemized copy of which giving amount of each shipment, consignor and consignee, when and where and to whom shipped attached hereto, and made a part of this affidavit.

He states that the complete record of liquor shipments from the Maysville Express Office from March 11th to May 8th, 1920, follows;

3/11/20	J. H. Rogers & Co. to Federal Dis't Co., Cincinnati, O.	(Gals.) 168
3/20/20	J. H. Rogers & Co. to Green Bros., Fairhaven, Vt.	38
3/24/20	H. E. Pogue Dist. Co. to Kettler Drug Co., Milwaukee, Wis.	35
3/24/20	J. H. Rogers & Co. to C. H. Magruder, New Orleans.	47
3/30/20	H. E. Pogue Dist. Co. to Patrick Flinn, New Haven, Conn.	622
3/30/20	J. H. Rogers & Co. to J. H. Terrell, St. Paul, Minn.	82
3/30/20	J. H. Rogers & Co. to M. B. Caslin, New Orleans, La.	37
4/24/20	J. H. Rogers & Co. to Jno. Daugherty, Philadelphia, Penn.	376
4/26/20	H. E. Pogue Dist. Co. to Patrick Flynn, New Haven, Conn.	812
4/26/20	H. E. Pogue Dist. Co. to Daniel Leechman, Chicago, Ill.	405
4/27/20	J. H. Rogers & Co. to E. W. Hefferman, Pottsville, Penn.	374
4/28/20	H. E. Pogue Dist. Co. to Yahr & Lange D. C., Milwaukee, W.	696
5/ 8/20	H. E. Pogue Dist. Co. to L. L. Bolline, New York.	1200
5/ 8/20	J. H. Rogers & Co. to L. L. Bolline, New York.	1200

Affiant further states that he has no interest whatever in the above styled action and did not know that same was pending until today when requested to make a sworn statement or affidavit setting out the facts as shown by the records of his office of whisky shipments forwarded by express of Maysville, Kentucky, at and from the dates aforesaid. He states that there has not been any shipments by express from the Maysville Office, during the period mentioned, to any point within the State of Kentucky.

B. H. LEATHERWOOD.

**Affidavit of William Dunn—Filed May 14, 1920.**

The affiant, WILLIAM DUNN, states that he is a member of the firm, trading and doing business under the firm name and style, Will Dunn Drug Co., of Lexington, Ky.

Affiant says that he is a registered pharmacist as well as a druggist, and that he has duly qualified and is au-

thorized to sell whiskey for medicinal purposes only and to compound medicines in which whiskey is one of the ingredients on the prescription of a regular licensed physician who has qualified under the Federal law to write such prescriptions. Affiant says that he is familiar with the current market price of Kentucky Whiskey for all times since March 16, 1920; that his knowledge is based upon purchases he has made as well as market quotations made by the wholesale dealers. Affiant says that his firm has paid for the whiskey which it has used in its business since March 16, 1920, \$25.00 per case for pints bottled in bond Kentucky whiskey. He says that the market price, based upon market quotations and prices made by wholesale dealers direct to his house since March 16, 1920, has been from \$20.00 to \$30.00 for pints bottled in bond Kentucky whiskey, based on the age, quality and proof of the goods offered. He says that the price which he has paid and the quotation above referred to included all charges for government taxes, state taxes, storage and clearance charges. He says that the character of goods which is required for use in his business has at all times since March 16, 1920, maintained an average price of \$24.00 per case for pint bottled in bond.

W. W. DUNN.

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**Affidavit of W. W. Wikoff**—Filed May 14, 1920.

The affiant, W. W. WIKOFF, states that he is now and for the last past thirty years has been freight agent for the Chesapeake and Ohio Railway Company at Maysville, Kentucky, and that as such he has had charge of and generally supervised all freight shipments, forwarded by freight, from the Maysville Freight Station.

He states that there is now two distillerys near the City of Maysville in Mason County, and that Maysville is the chief shipping point of both concerns. He states that during the period embraced from March 12th last, to date, there has been shipped by freight from Maysville, Two Thousand Seven Hundred and Twenty (2720) gallons of whisky. He states that from the records in his office that there has been, during said time, the following shipments of whisky:

March 27, 1920, H. E. Pogue Dist. Co. shipped 444 cases of whisky of 1667 gallons consigned to Daniel Lichterman, Chicago, Ill., April 5th, 1920, J. H. Rogers & Co. made shipment of 170 gallons of whisky consigned to Federal Distributing Co., Cincinnati, O. April 20, 1920, H. E. Pogue Dist. Co. shipped by freight 295 cases of whisky or 885 gallons consigned to Federal Distributing Co., Cincinnati, Ohio.

Affiant further states that the record of shipments in his office shows the shipments aforesaid, and he attaches hereto a copy of said record which is true.

W. W. WIKOFF.

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UNITED STATES RAILROAD ADMINISTRATION  
W. G. McADOO, Director General of Railroads.

CHESAPEAKE AND OHIO RAILROAD.

Maysville, Ky., May 13, 1920.

Ass't General Attorney,  
State of Kentucky,  
Frankfort, Ky.

Dear Sir:

The following are shipments of whiskey made from this station since March 12th, 1920:

444 cases of whiskey 1666 proof gallons, made by H. E.



Pogue Distilling Company March 27th, consigned to Daniel Lichterman, Chicago, Ill.

Shipment of 170 wine gallons, 169.69 gallons, 5 barrels of whiskey on April 5th from J. H. Rogers and Company, consigned Federal Distributing Company, Cincinnati, Ohio;

and on April 20th, 295 cases of whiskey, 885 wine gallons, 885 proof gallons, from H. E. Pogue Distilling Company, consigned to Federal Distillery Company, Cincinnati, Ohio.

Yours very truly,

W. W. WIKOFF,

*Agent.*

WWW: FM

Total No. of gallons 2720.69/100.

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**Affidavit of Harry A. Wiechelman**—Filed May 14, 1920.

The affiant, HARRY A. WIECHELMAN, first being duly sworn, on oath, says:

I am a resident and citizen of the City of Covington, Kentucky, and am engaged in the business of druggist and pharmacist, and have secured and possess proper permits to vend whiskey for medicinal use. I am familiar with the current market price of Kentucky Bourbon whiskey. This price is and was during the month of April, 1920, six dollars per gallon for whiskey in bulk, and affiant says that he paid this price for a barrel of Kentucky whiskey during said month containing about 43.4 gallons. Affiant says that this price which he paid included all charges for Government taxes, storage, clearance and State taxes, and further that this is the character of goods he sells upon authorized prescriptions for medicinal purposes, and that he paid the prices set out above for same.

H. A. WIECHELMAN.

W. L. WELLER & SONS.

126 W. Main Street

Louisville, Ky.

May 5th, 1920.

Dear Sir:

We have on hand three or four hundred cases Mammoth Cave Bottled in Bond Pints, and as we understand you have a permit to dispense whiskies as such on doctor's prescriptions, we take pleasure in quoting you these goods as follows:

Mammoth Cave Pts. B in B \$23.50 per case.  
net cash, express prepaid, and we are in position to make prompt shipments.

However, the demand for whiskey as medicine is constantly growing as more druggists are taking out permits almost daily and as there is about fifty million gallons of all kinds of distilled spirits in bond at this time, and no more being made, the price we think will continue to advance steadily, therefore, we quote prices for prompt acceptance only.

You will bear in mind that there are about one hundred and fifty million gallons of distilled Spirits used in the United States in normal times per year and you will readily appreciate that these fifty million gallons are not going to last long, and naturally the price will advance.

We also have some fine Brandy and Gin on hand and Pure Blackberry Wine, and if you are interested in these goods we will be glad to quote you prices.

Yours truly,

W. L. WELLER & SONS.

JOHN D. PARK & SONS CO., LTD.  
MEDICINAL LIQUOR DEPARTMENT  
WHOLESALE PROPRIETARY MEDICINES  
CHEMICALS, DRUGS, ETC.

603 Mercantile Library Building.

CINCINNATI, O.

May 10, 1920.

The Frankfort Drug Co.,  
Frankfort, Ky.

Gentlemen:

Replying to yours of the 7th, advise we can furnish Old Taylor bottled in bond quarts at \$23.00, pints \$23.50 in 25 case lots. In less than 25 case lots our price is \$25.00 per case.

We can furnish Frankfort Bourbon, 4 years old, in bulk, at \$6.00 per gallon, including all taxes and charges. Old Taylor in bulk at \$6.00 per gallon.

Very truly yours,

JOHN D. PARK & SONS CO., Limited,  
Medicinal Liquor Dept.,

By

SF;H

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**Affidavit of Mason Brown**—Filed May 14, 1920.

The affiant, MASON BROWN, states that he is a druggist engaged in the business in Frankfort, Kentucky, and has been for several years, and that he is authorized under Federal permit to sell liquor on prescriptions of physicians and he is now engaged in such business.

He states that he is familiar with the prices charged by brokers and dealers in liquor to the drug store trade over the country for medicinal purposes. He files herewith a quotation from John D. Parks & Sons, of Cincinnati, Ohio, under date of May tenth, quoting prices on

whiskey for medicinal purposes and also price list of W. L. Weller & Sons, of Louisville, Kentucky, dated May fifth, 1920, quoting prices on liquor for medicinal purposes and he says that the prices quoted therein represent about a fair average prevailing price charged by brokers and liquor dealers for whiskey when sold to drug stores for medicinal purposes. Said two quotations are marked "Exhibit A" and "Exhibit B" respectively.

MASON O. BROWN.

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**Affidavit of O. A. Boeckley**—Filed May 14, 1920.

The affiant, O. A. BOECKLEY, first being duly sworn, on oath, says:

I am a resident and citizen of the City of Covington, Kentucky, and am engaged in the business of druggist and pharmacist, and have secured and possess proper permit to vend whiskey for medicinal use. Affiant says that he is familiar with the current price of Kentucky Bourbon whiskey, and that this price is and has been since about the first of March, 1920, six dollars per gallon for whiskey in bulk, and affiant says that he purchased during this time a barrel of Kentucky whiskey at this price per gallon. Affiant says that this price which he paid per gallon for said whiskey included all charges for Government taxes, storage, clearance charges and State taxes, and further that this is the character of goods he sells upon authorized prescriptions for medicinal purposes, and that he paid the prices set out above for same.

O. A. BOECKLEY.

**Affidavit of J. P. Tarbeck**—Filed May 14, 1920.

The affiant, J. P. TARBECK, first being duly sworn on oath, says:

I am a resident of the City of Lexington, Kentucky, and am a regularly licensed druggist and pharmacist, and have secured and possessed proper permits to vend whiskey for medicinal use. Affiant says that he is familiar with the current market price of Kentucky Bourbon Whiskey and this price is and has been since March 16th, 1920, from \$22.50 to \$25.00 per case for pints bottled in bond.

Affiant says that he has had quotations from W. L. Weller & Sons of Louisville, Ky., and from Alfred Vogeler Drug Co. of Cincinnati, O., and other wholesale dealers since March 16th, 1920, and that the lowest price quoted him per case in pints for bottled in bond Kentucky Whiskey was a quotation made by W. L. Weller & Sons at \$22.50 per case. He says that Alfred Vogeler Drug Company of Cincinnati, O. made him a quotation on yesterday of \$24.00 per case for said whiskey. Affiant says that the price which he paid and the above quotation were made upon the basis of all charges, including taxes, storage, clearance charges should be paid by the seller.

J. P. TARBECK.

**Affidavit of C. M. Fisher**—Filed May 14, 1920.

The affiant, C. M. FISHER, states on oath that he is the General Agent of the American Railway Express Co. for Louisville, Jefferson Co., Kentucky, and that he has a record in his office showing the shipments of whiskey from his office, and that from said records there has been delivered to said Express Company for shipment, 12112 cases and 1204 barrels of whiskey from and including the 12th day of March, 1920, up to and including the 12th day of May, 1920.

Affiant says that all of the above said whiskey was shipped out of the State of Kentucky by the consignors, except 6 barrels and 83 cases, which were shipped to points in Kentucky.

Affiant says that the above appears from the records in his office, and constitutes all the shipments of whiskey from his office.

Signed: C. M. FISHER.

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**Affidavit of C. E. McCarthy**—Filed May 14, 1920.

The affiant, C. E. MCCARTHY, states that he is a member of the firm of Hayes & McCarthy, retail druggists of the City of Lexington, Kentucky, and as such druggist is duly and regularly licensed to purchase and sell whisky by prescription for medicinal purposes.

The affiant states that he has recently received quotations from wholesale whisky concerns on prices for whisky to be used by him in his said business; that on the 6th day of May, 1920, he received a quotation from W. L. Weller & Sons, of Louisville, Kentucky, quoting Mammoth Cave Whisky in pints, bottled in bond, at \$23.50 per

case, and the affiant files herewith and makes a part hereof the said quotation, marked for identification Exhibit "A."

The affiant further states that on May 10, 1920, he received from Jno. D. Park & Sons Co., of Cincinnati, Ohio, the following quotations on, bottled in bond, pints of Old Taylor and Bond & Lillard:

50 case lots	\$22.00
25 case lots	23.00
10 case lots	24.00
5 case lots	25.00

and that this said concern further offered to furnish him in bulk Six Year Old Chicen Cock Whisky at \$6.00 per gallon, and the affiant files herewith and makes a part hereof the said quotation, marked for identification Exhibit "B."

C. E. MCCARTHY.

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W. L. WELLER & SONS.

126 W. Main Street

Louisville, Ky.

May 6th, 1920.

Dear Sir:

We have on hand three or four hundred cases Mammoth Cave Bottled in Bond Pints, and as we understand you have a permit to dispense whiskies as such on doctor's prescriptions, we take pleasure in quoting you these goods as follows:

Mammoth Cave Pints B in B \$23.50 per case net cash, express prepaid, and we are in position to make prompt shipments.

However, the demand for whiskey as medicine is constantly growing as more druggists are taking out permits almost daily, and as there is about fifty million gallons of all kinds of distilled spirits in bond at this time, and no more being made, the price we think will

continue to advance steadily, therefore, we quote prices for prompt acceptance only.

You will bear in mind that there are about one hundred and fifty million gallons of distilled spirits used in the United States in normal times per year and you will readily appreciate that these fifty million gallons are not going to last long, and naturally the price will advance.

We also have some fine Brandy and Gin on hand and Pure Blackberry Wine, and if you are interested in these goods we will be glad to quote you prices.

Yours truly,

W. L. WELLER & SONS.

Exhibit A

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JOHN D. PARK & SONS CO., LTD.  
MEDICINAL LIQUOR DEPARTMENT.

603 Mercantile Library Building,

Cincinnati, O., May 10, 1920.

Hayes & McCarthy,  
309 W. Main St.,  
Lexington, Ky.  
Gentlemen:

In reply to your letter of the 7th, pleased to advise that we can furnish bottled in bond pints Old Taylor and Bend & Lillard, in

50 case lots at	\$22.00
25 case lots at	23.00
10 case lots at	24.00
5 case lots at	25.00

We can also furnish in bulk 6 year old Chickencock at \$6.00 per gallon.

Trusting to receive your order, we remain

Very truly yours,

JOHN D. PARK & SONS Co., Limited,  
Liquor Dept.

By

SF:H



**Affidavit of Robert A. Gordon—Filed May 14, 1920.**

The affiant, ROBERT A. GORDON, first being duly sworn, on oath, says:

I am a resident and citizen of the City of Covington, Kentucky, and am engaged in the business of druggist and pharmacist, and have secured and possess proper permits to vend whiskey for medicinal use. I am familiar with the current market price of Kentucky Bourbon whiskey. This price is and has been since about the first of March, 1920, at the rate of twenty-four (\$24.00) dollars per case, bottled in bond whiskey. This price includes all charges for Government tax, storage, bottling, clearance charges and State tax. Affiant further says that this is the character of goods he sells upon authorized prescriptions for medicinal purposes, and that he paid the price set out above for same.

Further affiant saith not.

ROBERT A. GORDON.

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**Order Filing Motion for Injunction, Motion to Dismiss Bill, Affidavits, and Submitting Motions—Entered May 14, 1920.**

This cause now coming on for hearing in this court before the Honorable Arthur C. Denison, a Circuit Judge for the Sixth Circuit, Honorable Walter Evans, Judge of the United States District Court for the Western District of Kentucky, and Honorable John E. Sater, Judge of the District Court of the United States for the Southern District of Ohio, on the motion of the plaintiff for an injunction *pendente lite*, the plaintiff appeared by Levi Cooke and Trabue, Doolan, Helm & Helm, its counsel,

and filed a copy of its motion for an interlocutory injunction entered here in April 29, 1920, duly served upon the defendants and also notice duly served of the time and place of hearing of said motion. The plaintiff also filed to be read upon said hearing the affidavit of James Thompson.

The defendant, Louisville Public Warehouse Company, appeared by Wm. Overton Harris, its counsel, and tendered a motion to dismiss the Bill of Complaint herein, which motion is ordered filed.

Defendants, John J. Craig, Auditor of the Commonwealth of Kentucky, and Charles I. Dawson, Attorney General for the Commonwealth of Kentucky, appeared by said Charles I. Dawson, Attorney General, and filed a motion to dismiss the Bill of Complaint herein and also a Plea in Abatement and Motion to stay proceedings and in support of same filed a certified copy of the record of the Franklin Circuit Court in the case now pending therein of S. Rosenbloom & Company v. E. H. Taylor, Jr. & Sons.

The Court directed that the hearing proceed both upon the motion this day filed and upon the motion for an injunction *pendente lite* and the defendants filed to be read upon the hearing of the motion for an injunction the affidavits of Wm. Dunn, John J. Craig, Robt. A. Gordon, J. P. Meehan, Mason Brown, Harry A. Wichelman, O. A. Doeckley, J. P. Tarbeck, Elwood Hamilton, C. E. McCarthy, C. M. Fisher, P. H. Leatherwood and W. W. Wickoff.

The defendants having announced that they were unable to proceed with the hearing without obtaining further testimony and there not being sufficient time to hear same orally, the Court directed that this cause be referred

to A. G. Ronald, Clerk of this Court, as Special Master, who was selected because of his experience and peculiar fitness therefor, to take the testimony offered by the parties and to file same on or before May 19, 1920. It is further ordered that this cause be submitted on all the said motions with leave to all parties to file briefs on or before May 19, 1920.

Approved for entry May 14, 1920.

A. C. DENISON,

*Circuit Judge.*

WALTER EVANS,

and

J. E. SATER,

*District Judges.*

**Testimony Taken Before Special Master—Filed  
May 19, 1920.**

The depositions of William J. Gorman, Alfred B. Flarsheim, Joseph E. Oppen, Marion E. Taylor, A. C. Thompson and D. L. Lally taken by consent before the Master, Mr. Allie Ronald, on the 15th day of May, 1920, at the Clerks office of the District Court of the United States for the Western District of Kentucky to be read as evidence for the defendants in the above styled action.

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Appearances:

For plaintiff: Mr. Levi Cooke and Mr. T. Kennedy Helm.

For defendants: Atty. Genl. Charles I. Dawson and Mr. W. T. Fowler.

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WILLIAM J. GORMAN, called for the defendants, being duly sworn by the Master and being interrogated by General Dawson, deposed as follows:

Q. Your name is William J. Gorman?

A. Yes, sir.

Q. State what business you are engaged in?

A. I am Secretary and Treasurer of W. A. Gaines & Company, Distillers of Frankfort, Kentucky.

Q. Were you in that occupation on and prior to the 12th day of March, 1920.

A. I was.

Q. How long have you been connected with the Company?

A. Since 1900.

Q. State whether or not you were acquainted with the prevailing market price prior to the 12th day of March, 1920, of Kentucky Bourbon whiskey, say of four years of age, in bond, in case of pints?

Mr. T. Kennedy Helm: I object to so much of this

question as says "bottled in bond" because the controversy here is as to whiskey in bulk and not bottled in bond. Whiskey bottled in bond is not whiskey in bond; it is free whiskey.

Q. You take whiskey from the bonded distillery warehouse and remove it to another warehouse for the purpose of bottling and you there bottle it in bond, do you not?

A. Yes, sir.

Q. So I ask you what the prevailing market price of four year old bourbon whiskey of the character you make was prior to the 12th day of March, 1920 when bottled in bond in pints?

Mr. T. Kennedy Helm: The plaintiff also objects to this question on the ground that the value of W. A. Gaines & Companys special brand with a great reputation is an entirely different thing from the market price of the whiskey in controversy in bulk.

The Master: The Master is of the opinion that the testimony should be limited to the value of whiskey of the same character and quality as that involved in the controversy in this action; but under the Equity Rules it seems to be the Master's duty to have all the testimony transcribed and reported to the court so that the Court may judge of its competency; and the objection is therefore overruled. The Master makes this statement because it will probably be applicable to other objections that may arise.

Mr. T. Kennedy Helm: We except to the ruling.

A. Do you mean in cases?

Q. Yes.

A. \$30.00 a case.

Q. That, of course, included all Government taxes, storage charges, interest and ad valorem taxes, did it not?

A. It included all of that.

Q. Was that price f. o. b. at the distillery?

A. Yes, sir.

Q. State what the market price of that same whiskey bottled in the same way now is?

A. Just following the application of the new fifty cent tax the price was first reduced to \$25 a case, then a few days later to \$22. a case and at the present time the price is \$21 a case, all on account of this fifty cent tax.

Q. Do you know whether your company has been

selling whiskey bottled in bond in case lots since the effective date of the fifty cent tax law in Kentucky?

A. Have they sold it since then?

Q. Yes.

A. Yes; they have sold a limited quantity.

Q. Do you know how much your company has sold since the 12th day of March, 1920?

A. Approximately probably 1000 cases.

Q. That is equivalent to 3,000 gallons is it not?

A. Yes, sir.

Q. Has that whiskey been sold to customers in Kentucky or outside of Kentucky?

A. Entirely to customers outside of Kentucky with the exception of two cases. All the rest was sold outside of the State.

Q. To what parts of the United States has the most of that whiskey been sent?

A. To the States of New York and Wisconsin.

Q. During the month of April from the 13th of April up to and including the 23rd of April, common carriers would not receive whiskey for shipment because of an embargo or strike?

A. The embargo was not on all of the railroads. There were exceptions where we could make shipments. And the embargo changed from time to time. We were able during the embargo period occasionally to ship whiskey to the States of New York and Wisconsin.

Q. Have you shipped whiskey since the effective date of this law into Pennsylvania?

A. We have.

Q. Pennsylvania has a considerable quantity on hand in that state?

A. I believe that is so.

Q. Are you selling or have you sold since the 12th day of March any warehouse receipts?

A. We have sold warehouse receipts.

Q. Since the 12th day of March?

A. Yes; since the 12th day of March.

Q. Are you able to state how much business you have done in this particular since the 12th day of March approximately.

A. We have probably sold five or six hundred barrels—warehouse receipts for five or six hundred barrels.

Q. That is approximately 2,000 or 2,500 gallons?

A. Yes, sir.

Q. State what price you obtain for those warehouse receipts?

A. We have sold whiskey since March 12 around one dollar per gallon and the highest was \$1.10 per gallon.

Q. How old was that whiskey?

A. Covering several seasons, some the Spring of 1913—most of it was Spring of 1913—seven year old whiskey.

Q. Those warehouse receipts, of course, were sold under the condition that the purchaser take care of the Government taxes the ad valorem taxes and this fifty cent tax?

A. Yes, sir.

Q. Your purchasers knew at the time, I suppose, and you explained to them this new fifty cent tax imposed by the law of Kentucky?

A. On those particular lots, but those holding warehouse receipts prior to that date would not have knowledge of that fact.

Q. During its distilling business, had your Company engaged in the practice of selling warehouse receipts from time to time as it placed its whiskey in its distillery bonded warehouse?

A. Yes.

Q. Prior to the enactment of this law where warehouse receipts were sold at the time the spirits were placed in the Distillery Bonded Warehouse, what price by the gallon did you get for those warehouse receipts?

A. Whiskey sold in that way—sold at the time of its manufacture, our selling price at the time on the Old Crow Bourbon was 65 cents per gallon, Old Crow Rye 75 cents per gallon, Hermitage Bourbon whiskey 60 cents per gallon, Hermitage Rye 70 per gallon and carrying charges from the date of entry into the warehouse.

Q. So that a person who purchased these warehouse receipts from your Distillery at the time of the manufacture of the whiskey which they represented, if he secured his whiskey at 65 cents a gallon had to stand, counting the fifty cents tax, now \$1.15?

A. Not exactly.

Mr. T. Kennedy Helm: If I understood the witness he is testifying that the sale of new whiskey when taken from the distiller and put into the distillery bonded warehouse was at 60 or 70 per gallon. The question of the Attorney General seems to presuppose that there were no

carrying charges running against that whiskey. I object to the question which presupposes that there were no carrying charges.

Gen. Dawson: I did not presuppose that at all.

The witness: I could not answer the question as put.

Q. So then exclusive of the carrying charges, when that whiskey is entered into bond, there is no way of telling at that time just what that whiskey will represent in cost to the man who tax pays it when he comes to tax pay it, even though he tax pays it two or three months or four or five years after it is entered?

A. To explain: When we are selling warehouse receipts now, we absorb all the charges from the date of the manufacture up to the present and make a price of so much per gallon, all charges paid to date which is vastly different from buying whiskey when originally made—the holding charges follow it.

Q. Do you mean to say that the prices you quoted a while ago of warehouse receipts negotiated as of this date covered all warehouse charges?

A. All warehouse charges. The only time we let those follow is where the man buys the whiskey at the time it was made, what we call "on contract." Subsequent to that, we have been absorbing all charges.

Q. Did you sell warehouse receipts at any time within a few months prior to the 12th day of March, 1920?

A. We did.

Q. What was your price for those warehouse receipts then?

A. Varying prices—we sold quite a lot at \$1.50.

Q. \$1.50?

A. Yes, we were selling at that.

Q. Take four year old whiskey of the character of whiskey manufactured by the Imperial Distillery Co. and which was manufactured, say in the year 1916, if you are familiar with that character of liquor, state what warehouse charges would be on that liquor up to this date approximately?

A. I have no knowledge of the warehouse charges made by the Imperial Distilling Co. In fact, I do not know anything about their warehouse charges.

Q. The charge of five cents per barrel per month is a general charge made by all distillery warehouse companies?

A. It was up to a year or two ago when the distillers



advanced their charges, some to ten cents and some to fifteen cents, so I heard.

Q. But in 1916 the prevailing price was everywhere five cents per barrel per month?

A. So far as I know.

Q. And at that time, the ad valorem tax assessment on liquor in Kentucky was everywhere—

A. \$21 per barrel.

Q. And the interest charges were practically the same everywhere, were they not?

A. No doubt.

Q. And the insurance charges practically the same everywhere?

A. There has been a vast change in the insurance rate but I don't know whether that prevailed as far back and 1916 but insurance on whiskey has increased greatly in value.

Q. By Mr. Cooke: Do you mean increased in value or that the cost of it has increased?

A. That is what I was speaking of, the premium.

Q. By Gen. Dawson: But it had not increased in May, 1916, had it?

A. I don't know whether it had just that far back or not, but possibly it may have been when the companies began increasing their rates.

Q. So that it is true that for the four year period running from 1916 the fixed warehouse charges were practically the same throughout Kentucky?

A. I rather think so.

Q. Now then, whiskey of the character manufactured by the Imperial Distilling Co. in the year 1916, what in your judgment would be a reasonable estimate of the warehouse charges on a gallon of whiskey?

A. For four years?

Q. Yes.

A. Probably one half a cent a gallon.

Q. One half a cent a gallon per year?

A. Yes, sir.

Q. You mean two cents a gallon for the four years?

A. It would be a half a cent a gallon for the four years.

Q. Then would you take into consideration the wastage on top of that?

A. That would not have anything to do with the warehouse charges. This amount we just mentioned

might be lost by the distiller by an accident to the barrel by which he would have to make good an excessive loss so that his storage account with a man is frequently a loss.

Q. To the distiller?

A. Yes, sir; it is not always a gain.

Q. The man who purchases warehouse receipts at the time the liquor is placed in the distillery bonded warehouse naturally at the end of the withdrawal period has sustained some loss by reason of the evaporation?

A. Yes, sir.

Q. What would that amount to on a gallon of whiskey?

A. It is hard to tell on a gallon. The Government provides a scale called the Carlisle Allowance that makes a given allowance for a given number of months which changes every three months about. It starts at one gallon and at the end of seven years it is 13½ gallons.

Q. Per what?

A. Per barrel.

Q. Were you acquainted or are you now acquainted with what the prevailing price of warehouse receipts was of the product of the Imperial Distilling Company in October, 1916?

A. I would not care to pass on that off-hand because I really do not know.

Q. Could you secure that information and give it to the stenographer?

A. I don't know that I could. I would have to make application to some broker and ask him if he had some old tables. We never try to keep track of competitive brands. Our whiskeys had a fixed selling value from the date of manufacture.

Q. Did the price of warehouse receipts increase in value after the date that the Federal Law became effective which prevented the manufacture of liquor during the war period?

A. After what date?

A. After the effective date of the Federal Law preventing the manufacture of distilled spirits.

A. You mean October 3rd, 1917?

Mr. Cooke: It became effective September 8th, 1917, under the Lever Act of August 10th, 1917, which was the War Time Prohibition under food control.

A. There was a falling off in value on that account.

Q. Why did not liquor increase in value before that time?

A. Most of those holding warehouse receipts were trying to sell them so that they could be tax-paid before the effective date of that Act. They were anxious to get out from under.

Q. Later on and before January 10th, 1920, did not liquor advance?

A. There might have been an advance of a few cents a gallon but I do not recall anything of any consequence during that period.

Q. What other warehouse charges or fixed charges besides what you have enumerated here would a purchaser of warehouse receipts which were bought in 1916 have to take care of now if he wanted to release his whiskey from Bond, other than the Government and the State license tax?

A. If he owned the warehouse receipts he would be carrying insurance I think in the whiskey bonded warehouse, since he owned the receipts—there would be that charge and the local taxes, state, county and city, in the location in which the warehouse was which contained the whiskey. He would have to pay all of that in addition to the State's ad valorem tax.

Q. Do you know that the taxes in Jefferson County on liquor amounted to approximately per gallon per year since 1916?

A. The carrying charges exclusive of the Government tax and the State's 50 cent tax?

Q. Yes.

A. Probably one-half of a cent a gallon per month or about six cents a gallon per year.

Q. You mean that covers the amount of the tax here?

A. Yes, sir; the county and State tax—the ad valorem State tax and interest figured at six per cent.

Q. What I am trying to get at is figuring the State tax, the ad valorem tax that the man would pay on his liquor that he had in Bond represented by warehouse receipts, what would he pay in the way of county taxes on the same liquor, what would he pay in the way of insurance charges on the same liquor and what would he pay in the way of interest charges on the same liquor—what would that amount to per gallon per year as a whole?

A. About six cents.

Q. Six cents per gallon per year?

A. Yes, sir.

Q. By Mr. T. Kennedy Helm: Do you include the interest charges?

A. Not compound.

Q. By General Dawson: That would include interest on the cost of his investment?

A. His original investment. By the way, I might qualify that by saying that is really based on the old five cents per barrel storage charge and the old tax rate and the old rate of insurance and not the present rates of insurance. I want to make that explanation.

Q. If it were based on the present warehouse storage charge and the present insurance rate, what would it amount to?

A. It is pretty hard to say. The insurance some place for instance is four times as much as it is others. Insurance companies have gotten to the point where they almost make a special rate for every building in which whiskey is stored with regard rather to its hazard, the general hazard, which was not so closely followed up prior to the advent of prohibition.

Q. But presuming on the general average, what would it amount to per gallon per year at the new rates?

A. I am not prepared to say because our buildings are all brick and metal roof and automatic sprinklers and we get what they call the lowest rate so that we have had no occasion to investigate the higher rates except to hear our competitors say they have been forced to pay vastly increased insurance rates.

Q. Are you acquainted with the character of the bonded warehouse that the Louisville Public Warehouse Company owns?

A. The general character of it. It is what is known as a general bonded warehouse under Government regulations, a warehouse where whiskey can be transferred from its original location and maintain its status on the government record.

Q. It is such a building as would carry a low rate?

A. That would depend on the location of the bonded warehouse. There is one in Covington which comes to my mind which was formerly a distillery bonded warehouse and I was told that that is far from being a desirable place to have whiskey stored in bond.

Q. Are you acquainted with the General Bonded

Warehouse No. 1, Fifth District of Kentucky, owned by the Louisville Public Warehouse Company?

A. I am acquainted with it just in a general way. None of our whiskey has ever been transferred to that warehouse by our company.

Q. From your observation is that a good hazard as an insurance proposition?

A. I would think so, being within the city limits.

Q. Are you acquainted with the Distillery Bonded Warehouse maintained by the Imperial Distilling Co.?

A. I am not.

Q. Explain how a man who owns warehouse receipts evidencing the title to liquor stored in a distillery bonded warehouse goes about bottling that liquor in bond?

A. You mean under the present prohibition law?

Q. Yes.

A. The owner of the warehouse receipt cannot bottle that whiskey in bond unless he obtains first a permit from the United States Government to sell liquor and after he obtains that permit he would have to send to the distiller copies of the Government Bond 1410 accompanied by instructions to bottle the whiskey in bond for him. The Distiller could not recognize the order unless 1410 accompanies the order.

Q. What would be the next step?

A. The next step would be for the distiller to make application to the United States Government to regauge the whiskey for bottling purposes. He would then pay the Revenue Collector of the District for the revenue stamps that would have to be placed on the barrels and the whiskey would then become tax-paid as the check for taxes would have to go to the Collector with the application. After the whiskey has been tax-paid, it is moved to a bonded bottling house and there dumped into tanks and drawn off into bottles. After being drawn off into bottles each bottle is sealed with a Government stamp over the cork and those bottles are placed in a place especially prepared for that purpose and both bottles and boxes stamped and they are then removed from the bottling house under the supervision of the Government storekeeper in charge.

Q. Are you acquainted with the present cost, independent of taxes and warehouse charges and of the cost of the liquor itself of bottling in bond a case of whiskey in pints per case?

A. With the present labor cost and one thing and another, I would think it would be in the neighborhood of \$4.00.

Q. Per case?

A. Yes, sir.

Q. And a case contains how much?

A. Three gallons.

Q. Did your business in liquor increase in February over what it was in January, 1920?

A. I am not prepared to say just exactly what happened. It has been very light for some time. I don't know that it has increased—I would think January and February were about the same.

Q. Did your business increase in March over February?

A. During the month of March there were a few more druggists began selling in different parts of the country what they had purchased on the market but most of them had purchased several months back. They began to send them in and make inquiries about how to tax-pay whiskey. Prior to that they had whiskey bottled in bond but they began at this time to make inquiries about tax-paying in barrels.

Q. Has it increased in April over what it was in March?

A. I cannot say it has. We had a slight increase in New York but a very perceptible falling off at all other points.

Q. Have you been bottling in bond whiskey since the 12th day of March on purchases from wholesale liquor dealers and brokers?

A. The only whiskey we have bottled in bond since the 12th of March was whiskey of which we were the owners and which we contemplated selling to druggists. We haven't bottled for any customer.

Q. You have been shipping since the 12th of March?

A. Principally barrel trade, very few cases.

Q. Has it been going to wholesalers?

A. Some wholesalers but mostly to druggists.

Q. It is a fact, is it not, that the number of druggists securing permits to handle liquor on prescription has been constantly increasing since the passage of this law?

A. Hardly so. Outside of the State of New York, our travelingmen have been endeavoring to induce them

to do that but our traveling men write us that the druggists are disinclined to do so in view of the stringent restrictions and the reports they have to keep. Our Western representative has not been able to do anything at all.

Q. Do you know what was the name of the brand of whiskey manufactured by the Imperial Distilling Co.?

A. I do not.

Q. When did this advance in the selling price of your liquor up to \$1.50 per gallon occur?

A. That was not an actual advance. It was the price we were trying to get during the period when not much was going on. Whiskey really has had no fixed value for some time. Some of the higher priced whiskeys have been selling lower than some whiskeys that were originally called "trash" whiskeys.

Q. You got this price of \$1.50 notwithstanding the fact that you had quite a quantity of liquor that you wanted to dispose of?

A. We considered that we got the price for the reason that we had a very old established brand and possibly people wanted to get hold of some of it before it was entirely out.

Cross-examined by Mr. T. Kennedy Helm:

Q. Did I understand you to say that the value of whiskey when sold through the sale of warehouse receipts was at this time approximately one dollar per gallon?

A. At the present time, that is what I said.

Q. What was the value on the 10th of March or just before the passage of this Act?

A. \$1.50.

Q. If whiskey is located outside of Kentucky in a bonded warehouse, will it sell higher than whiskey located in Kentucky in a bonded warehouse?

A. That has been very evident since March 12th both as shown by the quotation of leading brokers and by correspondence that we have had with some of our customers, calling our attention to it.

Q. In other words, if the owner of warehouse receipts in Kentucky re-sells his warehouse receipts he has to deduct apparently the fifty cents per gallon in competition with whiskey located outside of Kentucky?

A. Yes; exactly right.

Q. Assuming that whiskey is manufactured and is

placed in a distillery bonded warehouse, with warehouse receipts, what was the current market price, in the Spring of 1916 when sold?

A. 1916—I am not prepared to say that.

Q. Your Old Crow brand was 60 cents for Bourbon and 70 cents for Rye?

A. That was Hermitage. The Old Crow was 65 cents and 75 cents.

Q. That was for new whiskey?

A. New whiskey the day it was made, with all the carrying charges following.

Q. Those whiskeys you have mentioned because of the well established brand, Old Crow and Hermitage, have uniformly sold higher than ordinary whiskey or what you call trash whiskey?

A. Invariably, uniformly, continually.

Q. The current price of new whiskey in the Spring of 1916 and in the Fall of 1916 was say 50 to 60 cents per gallon and the purchase of that whiskey up to this time would be out of his money practically four years?

A. Yes, sir.

Q. So that his interest charges amounts to 12 or 14 cents per gallon?

A. In four years it would amount to 24 cents a gallon, six cents a year.

Q. In addition to the cost price?

A. Yes, sir.

Q. And in addition to that he would have to pay the taxes—or would he?

A. He would have to allow for all the ad valorem taxes and the storage charges—he would have to make some arrangement with his purchaser about this new 50 cent tax which is a new proposition. Probably he would have to absorb that or a man in another state would make the sale. There is no question about that.

Q. Louisville taxes are variable, city and county taxes, from year to year?

A. Yes, sir.

Q. Insurance rates are variable according to the particular building in which the whiskey is located?

A. That is right.

Q. All of those things will have to be taken into consideration when you give the price originally of a proof gallon on the sale of the original warehouse receipts?

A. Yes, sir.



Q. Can you give any idea of the approximate net profit to the owner of a warehouse receipt if he undertakes to sell whiskey four years old and which costs him 60 cents a gallon?

A. I don't think there would be any possible way for him to be entirely reimbursed.

Q. That is not counting the 50 cent tax?

A. Irrespective of that.

Q. I want to show you what purports to be an official form of the State of Kentucky for the report of distilled spirits by a warehouse and ask you if you are familiar with that form?

A. I am.

Q. That form correctly states the valuation placed by the State Board of Valuation and Assessment during its existence and later by the State Tax Commission on whiskey per barrel in Kentucky for all purposes, state, county and city, as a mere matter of valuation.

A. This report shows such valuation to be as follows:

1911, \$10 per barrel.

1912, \$12 per barrel.

1913, \$12 per barrel.

1914, \$12 per barrel.

1915, \$12 per barrel.

1916, \$12 per barrel.

1917, \$21 per barrel.

1918, \$25 per barrel.

1919, \$25 per barrel.

These valuations to my certain knowledge are correct and were fixed by the Board of Valuation on whiskey as of each one of these years.

Q. Whiskey in Bond?

A. Whiskey in Bond in Kentucky.

Q. That is for the ad valorem tax by State, City and County, is it not?

A. That is for valuation by State, City and County.

Q. And the rates for the respective jurisdictions vary except as to the State rate.

A. Exactly so.

Q. This report requires all warehousemen to make it and this valuation alone and the State rate alone shows the amount of the ad valorem tax of the State together with the added interest that the State of Kentucky could not collect until this whiskey was tax-paid to the Federal Government?

A. That is right.

Q. The County, City, Road and School taxes are not included on this report?

A. That is right.

Q. In addition to those taxes this report also requires the warehouse men to show the number of gallons withdrawn after the effective date of the two cents per gallon production tax on distillers, does it not?

A. With each payment of taxes that special two cent per gallon tax is paid independently of the ad valorem figures. It has to be paid in addition to that.

Q. That was under the Act of 1917 which started the two cent whiskey production tax?

A. That is right. I might add that in some counties additional road taxes add greatly to the burden of taxation.

Q. Will you please identify this official form of the State of Kentucky and file it with your deposition?

A. I identify this report and file it as "Exhibit Gorman No. 1."

Re-examined by General Dawson:

Q. You know, as a matter of fact, that the two cents license tax referred to in your testimony was not an annual accruing charge and carried no interest charges and was payable only on removal or transfer under bond?

A. That is true for the reason that we have been paying that tax each four months ever since it was assessed, and, therefore, there was no possibility of accumulation. That has been paid right along since it first became a law.

Q. And was paid as it was removed from the bonded warehouse.

A. It was paid every four months. We made this report every four months and we always paid the taxes to the State, County and City every four months and on all the other items except the two cent tax the back interest was charged for the reason that those charges are not collectable until the withdrawal of the whiskey.

Q. But my question is you paid the two cent tax only once and then only on the quantity of whiskey withdrawn up to the date of your report?

A. That is right.

Q. You are not selling warehouse receipts to any druggist at \$1.00 per gallon, are you?

A. No, sir; we havent sold any directly to druggists at that price.

Q. Dont you know the prevailing price of warehouse receipts to druggists who are the main consumers and who constitute the main market for whiskey now has been since this law became effective on March 12th has been \$1.50 to \$1.65 per gallon.

A. I know positively that is not a fact with regard to the only druggist I spoke to on the subject. He told me he would buy all the whiskey he wanted at 80 cents a gallon.

Q. Have you seen the reports that the various brokers and liquor dealers are sending out with quotations as to what they are selling these warehouse receipts at?

A. Here is a card of Friedman-Richard, May 11th, the only one I have noticed lately and which reached our office a few days ago. That firm of Friedmann-Richard bought a lot of Old Crow-Rye at \$1.15 a short time ago.

Q. I will ask you to file that card as part of your testimony marked "Exhibit Gorman No. 2."

Recross-examined by Mr. T. Kennedy Helm:

Q. The first quotation of \$1.50 per gallon is on Farmdale Rye, 1917?

A. Yes, sir.

Q. Do you know where Farmdale Rye is made?

A. No, sir.

Q. Is it not true that for years Eastern Rye whiskey has sold higher than Kentucky or Bourbon Whiskey?

A. Yes, sir.

Q. The next quotation is \$1.40 per gallon on Kickapoo stored in Illinois, Illinois production?

A. That is what it says there. I am not familiar with that.

Q. Is this in a bonded warehouse?

A. It is all bonded warehouse.

Q. It is labeled "Illinois \$1.40"?

A. Yes, sir. Those prices seem to go about 50 cents higher than Kentucky.

Q. Then this Jack Beam is a Kentucky whiskey?

A. Yes, sir.

Q. J. H. Beam of Nelson County?

A. Yes, sir.

Q. Is that Old Tub?

A. I dont know.

Q. That is one of the old brands?

A. An old brand.

Q. Quoted at \$1.25?

A. Yes, sir; and it generally supposed that you can buy whiskey for less than it is quoted by brokers.

General Dawson: We object to suppositions.

The Witness: It is a fact.

Q. By Mr. Helm: I want to show you a card of this same Freedman-Richard, Commission Merchants of Cincinnati, Ohio of date May 4th, 1920, and I ask you to identify that card and file it as a part of your deposition as Gorman No. 3 which shows some higher prices for Rye whiskey and I ask you if on that card they do not quote as the only Kentucky whiskey Indian Hill at 95 cents a gallon in Bond?

A. The only Kentucky bourbon, do you mean?

Q. Yes.

A. Yes, that seems to be the case. I believe the Everglade and others mentioned are all Rye whiskeys. I file this card as "Exhibit Gorman No. 3."

Q. Is it or not true that there are many factors which enter into the final sale of whiskey governed by the ordinary rule of supply and demand, the location of the goods, the desire of the purchaser for a particular brand and many factors which really are trade features in the selling price?

A. It is.

Q. As you have said, the market quotations are simply what the owner would like to get, and not any proof as to what he does get?

A. That is it exactly. I have heard of lots being bought lower than the quotation sent out on them.

Q. These are quotations on a small quantity and do not mean that these are the current prices on 200 barrel lots but merely for one or two barrels to druggists?

A. That is true.

Q. If you had a warehouse receipt and were offering it for sale through this Freedman-Richard concern would the owner of that receipt get anything like the prices they quote to druggists?

A. He would not. He would not even get the price named because he would have to deduct all the carrying charges to the date of sale.

Q. Likewise the broker's commission?

A. Likewise the broker's commission.

## Re-examined by General Dawson:

Q. You dont know whether this Kentucky whiskey which is quoted here is stored in a Kentucky bonded warehouse or not?

A. I know the Old Crow-Rye is in a Kentucky warehouse but I dont know about the other brands.

Q. How do you know it is in Kentucky?

A. Because all of the Old Crow-Rye whiskey in Bond is now in our warehouse for the reason that it was all taken by one firm in New York, H. B. Kirk & Co. and they have been selling warehouse receipts to this Freedman-Richard concern for the last two or three months, something they never did before. I might add to that that there was some Old Crow whiskey sent to a general bonded warehouse in New York last Fall at which time the owners expected to export it but they did not export it and they wrote us about a month ago that they had tax-paid that and withdrawn it from Bond from the New Jersey warehouse all the Old Crow-Rye that is not in Bond so that from that date up to the present time all the Old Crow in Bond is in our warehouses.

Q. You have bottled whiskey on orders sent from the trade?

A. Not within the last few years.

Q. By the Master: Do you think the price of Old Crow Rye whiskey can throw any light on this controversy?

Mr. Helm: I dont think it throws the slightest light.

General Dawson: I am not insisting on the price of Old Crow-Rye.

The Master: You have taken a lot of evidence on it.

Gen. Dawson: I think this question is important though. What is the whiskey that has been manufactured in Pennsylvania, Rye or Bourbon?

A. Principally Rye. I never heard of any Bourbon being made there.

Q. What about the Maryland whiskey?

A. All Rye.

Q. What about the great bulk of distilled spirits in bonded warehouses in Illinois?

A. Of that I would have no knowledge but I would say from my general opinion that that is Bourbon.

Q. The greater part of the spirits they have there is what is known as high wines?

A. Illinois has always been known as a place where high wines and things of that character were manu-

factured, around Peoria, but we had very little occasion to have any dealings with them. We never had any dealings with them and had no occasion to investigate what they were making.

Q. So that when you get out of Kentucky in a large measure Kentucky whiskey comes in contact with Rye whiskey and with the products of the Illinois distillation.

A. Kentucky whiskey is not in competition with all of them because the value of brands has been destroyed. Whiskey is now whiskey most any place, especially in selling to druggists because they are less inclined to buy good whiskey than any customers the distillers ever had.

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ALFRED B. FLARSHEIM, called for the defendants, being duly sworn and examined by General Dawson, deposed as follows:

Q. What is your name?

A. Alfred B. Flarsheim.

Q. What is your business?

A. Vice-President and General Manager of the Bernheim Distilling Co.

Q. Has that company any liquor on hand?

A. It has unfortunately.

Q. State whether or not since the March 12th, 1920, your company has sold any liquor to the trade, which under the terms of the Act of the Legislature which is attacked in this Bill, the 50 cents tax is due on?

A. It has.

Q. How much have you sold?

A. I presume I am permitted to look at my memorandum?

Q. Yes.

A. Of Kentucky whiskeys stored in Kentucky—may I make that distinction, stored in Kentucky, because the Bernheim Distilling Co. was fortunate enough to have a great many barrels of Kentucky whiskey stored outside of Kentucky—but of Kentucky whiskeys stored in Kentucky we have sold since March 12th, 1920, only 59 barrels.

Q. Have you sold any case goods?

A. We have.

Q. State how much case goods you have sold?

A. Of Kentucky whiskeys stored in Kentucky since

March 12th, 1920, we have sold 1718 cases bottled in Bond.

Q. Where did that liquor largely go?

A. To various parts of the country, Chicago, Pennsylvania, New York and other points.

Q. How much of your whiskey in Bond did you sell from Kentucky during the month of February, 1920?

A. I have not those records and I am unable to state.

Q. Will you examine your records before the testimony is completed and at a later date give that amount?

A. I will.

This amount was later telephoned to the stenographer as 38 barrels.

Q. How much of case goods did you sell from your Kentucky warehouse during the month of February, 1920?

A. Same answer as to the previous question, have no records with me.

Q. I make the same request for you to furnish that information to the stenographer.

A. I will do so.

This information was afterwards telephoned to the stenographer as 341 cases. See copy of letter at end of deposition.

Q. What have you been getting for your barrel whiskey sold from your Kentucky Distillery Warehouse since the 12th day of March, 1920.

Mr. Helm: I object on the same ground heretofore given that sales by other distillers of their particular brands to old or new purchasers are not competent or relevant. The only proper question is as to the current market price of whiskeys within and without Kentucky.

The Master: That might throw some light on the matter.

A. I have no record but my recollection is that we have been receiving around \$1.40.

Q. To get this accurately in the record will you examine your records on that and report that also to the stenographer?

A. If I am compelled to answer I will look up the records.

Mr. Helm: I object to requiring these gentlemen to go to their records and dig up averages on commodities sold under particular circumstances at various times and to strike a general average on it, as throwing no light on the question involved. I might also add that this has no

bearing in determining the validity of a tax, in other words whether a particular distiller can sell at \$1.40 or can sell at 90 cents where the tax is absolutely and uniformly 50 cents. I don't think it is of the slightest importance.

Gen. Dawson: Putting one man out of business does not make a tax invalid. It is putting the class out of business. I don't think the witness is compelled to disclose any secrets or the names of any customers or particular prices on particular lots. The witness from an examination of his records of his sales can be asked to state what was the market price of the whiskey at the particular date in controversy. I do not mean by this that we can put on the witness the burden of making any extensive search of his records but only such examination as will enable him to answer the question.

Q. Now with that understanding or ruling, will you furnish the information to the stenographer?

A. I will, but I think I can answer it right now. By reason of our maintaining practically the only extensive organization, we are obtaining more for our merchandise than current market provisions and our average is about \$1.40 from which should be deducted the expense of conducting our business.

Q. Of course, that price does not include the Government tax or the warehouse charges or the 50 cent tax.

A. No. That price is accrued charges paid to date of sale. When I say "accrued charges" I mean storage, insurance, and other incidental charges such as interest on money invested, etc.

Q. You pay those?

A. Yes, sir.

Q. About what would that average per gallon for four year old whiskey?

A. I am unable to state that without checking that up. We have figured that it almost doubles the original purchase price.

Q. What was the original purchase price of your warehouse receipts for whiskey?

A. The original cost of manufacture was around 50 cents but a great many of these warehouse receipts we now own were purchased at a very much higher price during the advancing market prior to the going into effect of the Eighteenth Amendment.

Q. Can you give the average price per case of your



goods that you sold from your distilleries since the 12th of March, 1920?

A. About \$19.40 per case.

Q. Of course, you make a profit at that price?

A. We make some profit at that price.

Q. Your whiskey is Bourbon whiskey?

A. We make both Bourbon and Rye in Kentucky.

Q. The prices you are getting are the prices on Bourbon whiskey?

A. They are the prices on either. Since the elimination of the value of brands, it makes very little difference in the purchase of Kentucky whiskey whether it is Rye or Bourbon. I understand it is all sold as spiritus frumenti on doctors' prescriptions to druggists and "spiritus frumenti" label is placed over the brand.

Cross-examined by Mr. T. K. Helm:

Q. The Bernheim Distilling Co. with which you are connected deals directly with the trade?

A. It sells its commodity directly to the trade.

Q. Do you deal in the purchase and sale of warehouse receipts?

A. We do.

Q. Are you familiar with the market quotations when whiskey is sold through negotiable warehouse receipts evidencing the ownership of whiskey in Bond through brokers and Commission merchants?

A. Yes, sir.

Q. What is the prevailing market price in the United States of Bourbon whiskey stored in Bond when the sale is evidenced by the transfer of a negotiable warehouse receipt.

Q. For goods made in Kentucky, around \$1.00 per gallon, some lower and some a little higher.

Q. What is the current market price on similar goods outside of Kentucky?

A. From 50 to 75 cents a gallon higher for the same goods if stored in the market nearest the average consumption which is New York and Boston.

Q. Is the same true of most whiskey that some of them have a sort of reputation and brand and their location and reputation influences the actual sale?

A. That was my experience but I will state if permitted to that there has been a decided falling off in the sale of our whiskey since the passage of this 50 cents per gallon Act here.

Q. I didnt catch your answer with reference to the prevailing market price of warehouse receipts evidencing the ownership of whiskey stored in a warehouse outside of Kentucky. State what that market price is?

A. From \$1.50 to \$2.00.

Q. So that if a man who has a right to use whiskey undertakes to buy warehouse receipts for liquor outside of Kentucky he pays \$1.50 more than if he gets it in Kentucky?

A. No, sir; from 50 cents to 75 cents a gallon more.

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JOSEPH E. OPPER, called for the defendants, being duly sworn and examined by General Charles I. Dawson, deposed as follows:

Q. Do you live in Louisville?

A. Yes, sir.

Q. With what distillery are you connected?

A. Sunnybrook.

Q. What is your position?

A. General Manager.

Q. As a general manager in a general way do you have charge of the sales?

A. I have nothing to do with the sales.

Q. As general manager are you familiar in a general way with the quantity of liquor which has been shipped from your warehouses to the trade in different parts of the country since the 12th day of March, 1920?

A. Yes.

Q. Have you shipped and sold any since that date?

A. We have withdrawn from Bond and shipped I suppose in the neighborhood of 350 barrels what we tax-paid prior to March 12th and had on hand March 12th figuring on barrels. Of course some has been put up in cases since then but taking it in barrels I would take it that we would run 1200 or better, in other words, 75 or better with goods tax-paid prior to March 13th, 1920, before the fifth cent tax law went into effect. We tried to beat that.

Q. Where were those goods taxpaid?

A. On our premises.

Q. In a bonded warehouse?

A. They were taxpaid the 10th of March about, a few days before the Bill was signed. We took them out to beat that tax.

Q. You have sold 250 barrels outside of that?

A. That is all we have shipped.

A. Have you sold some more outside of that?

A. I don't know anything about sales.

Q. How much case goods have you shipped since the 12th day of March?

A. That was included but I don't know just how many. I should judge it would be maybe ten or twelve thousand cases. We bottled some goods since that we are holding today.

Q. Have you orders for goods now?

A. Very little.

Q. Where have the goods you have been shipped since the 12th of March gone to in a general way, not to what customers but to what territory?

A. Chicago, New York and Providence.

Q. Have any gone to Pennsylvania?

A. I don't recall any. There may have but I don't recall it. I don't pay much attention to the destination of whiskey.

Q. But all of it has gone out of Kentucky has it not?

A. Yes, sir.

Q. And has gone in competition with liquor on which this 50 cent tax imposed by the last Legislature is not levied?

A. Yes, sir.

Q. What has been the average price per gallon of the liquor you have sold?

A. I could not answer, I did not pay attention to that. I don't get any quotations. I am not in the sales end.

Q. Do you know how much liquor your concern shipped to the trade in the month of February, 1920?

A. No.

Q. Will you look that up and give it to the stenographer?

A. Yes, sir.

This information was afterwards telephoned to the stenographer as 19766.33 gallons.

Q. Do you know how much you shipped in the month of January, 1920?

A. I shall have to look that up.

Q. I make the same request with reference to that information?

A. All right.

This information was afterwards telephoned to the stenographer as 9,003.91 gallons.

Q. I will ask you also to give to the stenographer after examining your records, the amount you shipped during the month of April, 1920, and the amount you have shipped up to this date in the month of May, 1920?

A. All right.

This information was afterwards furnished to the stenographer as follows: April, 20,552.57 gallons May, 17,002.70 gallons.

See letter at back of depositions.

Q. State whether or not it is true that just before the 16th day of January, 1920, a great many distillers and dealers in liquors under Government permit removed quite a quantity of liquor into what is known as export bonded warehouse and which was caught when January 16th came on and did not get into the export trade: Is that so?

A. Yes, sir.

Q. This liquor you are selling from your bonded warehouses with this 50-cent tax is coming in contact with that liquor?

A. That we are selling—

Q. Is not some of that liquor being sold to the trade now?

A. I don't know, but I presume it is.

Cross-examined by Mr. Levi Cooke:

Q. The data that you have been asked to furnish to the stenographer as to your shipments during the months mentioned by the Attorney General would cover case goods that were withdrawn prior to March 12th?

A. Yes, sir.

Q. Some of which was still in your possession in free warehouses after March 12th?

A. Yes, sir.

Q. And which you have been shipping since that date?

A. Yes, sir.

Q. What liquors you have taxpaid and withdrawn since March 12th which may be subject to this 50-cent tax is only a small part?

A. I mentioned that at the beginning, that in barrels or cases reduced to barrels I would judge we had on hand of all kinds 1200 barrels taxpaid without the payment of the 50 cent tax. That was shipped from March 12th to a few days ago. Since that time on which

we have had to pay the 50 cent tax there has been about 350 barrels.

Q. Your company handles exclusively its own product?

A. Yes, sir.

Q. Your company expected a test to be made on the validity of this 50 cent tax?

A. Yes, sir.

Q. By Gen. Dawson: Are there any warehouse receipts out in the hands of purchasers of your liquor which is now stored in your bonded warehouse?

A. I suppose there are. I have not examined the records but I take it for granted that there are.

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MARION E. TAYLOR, called for the defendants, being duly sworn and examined by Gen. Dawson, testified as follows:

Q. State your name?

A. Marion E. Taylor.

Q. With what distillery are you connected?

A. I am President of Wright and Taylor, Inc.

Q. They manufacture Kentucky Bourbon Whiskey?

A. They used to and Rye also.

Q. Could you give the stenographer approximately the amount of whiskey that your concern has shipped from its warehouses to the trade since the 12th day of March?

A. I have been away about a couple of months so I have gotten it from the books, it has been furnished me by my manager. Proof gallons, total 3,699. Whiskey sold outside of the state since March 12th, 1920. Then of warehouse receipts, we have sold approximately 25,000 gallons, original gallons, warehouse receipts are sold on original gallons.

Q. Are you able to state the amount of liquor that you sold and shipped to the trade during the month of February, 1920?

A. I have no record but I am sure I can get that from my books.

Q. I will ask you to furnish that to the stenographer.

A. Outside of the state?

Q. Irrespective of where it was.

A. During the month of February, 1920?

Q. Yes. And furnish the same information for the month of January, 1920.

A. All right.

This information was afterwards telephoned to the stenographer as none during January, 435 proof gallons during February.

Q. In your January information please show what portion of that was export whiskey?

A. All right.

Of the above mentioned amount sold during January, 1920, the amount of export whiskey was none.

Q. What have you been getting on an average for warehouse receipts which you have sold since the 12th day of March?

A. I am really not familiar with all of the sales, in fact, with only a few of them, because as I say, I have been away two months on account of my health and only got back two or three weeks ago but we have very little whiskey of our own in our warehouses but we have a good deal of whiskey there for our customers and since this 50 cents a gallon tax they have been offering it to us—before the 50 cent tax it was offered at \$1.25. Two of our large customers from Chicago came down last week to the Derby and came in on Friday and, discussing this 50 cents a gallon tax, said they wanted to sell their whiskey and wanted to know what we would give them for it and we told them we didnt care to buy it, that we could not offer them anything like the price they paid for it, and we finally offered them 75 cents for it. They said “you offered us once \$1.25” and we told them that was before the 50 cents a gallon tax went on and we were not sure that we would have to pay this tax but we would take a chance and offer them 75 cents and they took it and said they were glad to take it. I said that from what our gathered our whiskeys have been selling all the way around from \$1.00 to \$1.75. Some of that whiskey that we have sold for \$1.75 was in small quantities to retail customers. I have here the sale of some spirits we had—

Q. Is this whiskey?

A. This is called spirits but it is put up in Bourbon barrels and marked Bourbon. Of this whiskey we have sold since March 12th, 240 barrels of spirits made out-

side of the State of Kentucky and stored outside of the State of Kentucky at 60 cents a gallon in Bond. Deducting the carrying charges and interest, these goods have netted us less than 50 cents per gallon. We have between 100 and 200 barrels stored in the state of Kentucky of the same whiskey and with this withdrawal tax of 50 cents at present they have no market value whatever. We have not been able to secure an offer for them at any price.

Q. What do you mean by "spirits" as referred to in your last answer.

A. Spirits are goods that some of these distillers make. It is a continuous whiskey that they make and put in charred barrels and brand "Bourbon" but it is known to the trade as spirits. Spirits put in barrels not charred are colorless but if they are put in charred barrels it gives them a color, and having a certain percent of small grain, it makes a merchantable whiskey to drink.

Now we have had some whiskey—this spirits stored here in Kentucky made by a distillery here that makes that character of whiskey and we haven't been able to get an offer on it because the purchaser will have to pay the 50 cents a gallon tax on it when it is shipped out of the state.

Q. It is a very inferior grade of whiskey?

A. No, it is not inferior. It is really superior. It is purer than fine Bourbon whiskey because it has very little fusel oil.

Q. Still it is not whiskey that appeals to the trade?

A. No but it will sell today just as well as Old Crow or Old Charter or Old Tavern or any other fine grade of whiskey, because brands are not considered now.

Q. Don't you know that the druggists who buy the bulk whiskey demand a better grade of whiskey than that?

A. If they can buy this whiskey as cheap or a little cheaper they will buy it. Some druggists are not very particular about that. I don't think this is as good for beverage purposes as some brands of Kentucky Bourbon. I don't claim that. If it were, we could get more for it than 60 cents a gallon.

Q. Among the whiskey people it is not known as a Bourbon whiskey.

A. It is known to the dealer as a Bourbon whiskey.

Q. But among the men who make whiskey and who

know what whiskey is, it is not regarded as a Bourbon whiskey?

A. No, I would not say it was generally.

Q. Is it not a fact that one large dealer in whiskey in this section has contracted with you from your distillery to bottle and prepare a lot of whiskey for him under his label?

A. I have just recently made a contract for a few thousand cases of our whiskey which they want their label put on instead of ours. Our regular government label that it is made Old Charter goes on but he wants a little sticker of his brand.

Q. That liquor is for the purpose of—

A. Selling to somebody to whom he has been selling and he wants it to go as his brand.

Cross-examined by Mr. Helm:

Q. As I caught one of your answers it was that you had 240 barrels of double strength spirits made in Cincinnati and stored in Cincinnati, Ohio, which you could sell or did sell at 60 cents per proof gallon; that you had a quantity of the same character of double strength spirits subject to this 50 cent tax stored in Kentucky that you cannot dispose of?

A. Yes, sir; we have offered it at 60 cents a gallon and we cannot find a purchaser, in fact, we cant get an offer on it.

Q. Are you familiar with the current market price outside of Kentucky of ordinary whiskey in Bond of no special brand?

A. I think the price list I have seen recently show that you could buy a dozen different brands of Kentucky whiskey for less than \$1.00 per gallon. And when I say a dozen different brands, I mean in that some brands that have as good a reputation as mine or anybody's else. I dont think they are considering brands now when they buy whiskey.

Q. Is it not true that frequently an established name or an established brand like Old Charter whiskey is ordered by people who ask no questions about price but who simply say send me some Old Charter whiskey.

A. The bulk of our orders come just that way with-



out asking the price and our agents will take an order—the market changes on whiskey like everything else—and our agents have sent orders in and left the price blank and left it to us to give the best price we can.

Q. People dont trade in warehouse receipts that way?

A. I dont think they do.

Q. Do you know of whiskey manufactured in Kentucky having been transferred to a general bonded warehouse located outside of Kentucky since the passage of this law?

A. I only know from hearsay in a general way that there is a great deal of Kentucky whiskey that has been transferred to bonded warehouses in San Francisco, Boston, Chicago and other places and I do know it to be a fact that Wright and Taylor shipped to Boston 150 barrels and the greater part of it we have there yet in bonded warehouses and the only reason we didnt ship a thousand barrels was because we couldnt get the room in the warehouse and that whiskey we can get a very much better price for and are getting a higher price for than whiskey stored in Kentucky on account of this 50 cents a gallon tax.

Q. Have you any idea of the approximate quantity of distilled spirits known as whiskey stored in bonded warehouses in Kentucky and the approximate amount of similar commodities Bourbon or Rye or Spirits which can be converted into whiskey stored outside of Kentucky?

A. I know from reports I have seen recently that there approximately 30 or 40 million gallons of whiskey in Kentucky. I saw that report several weeks ago. I do not know the quantity in the State now. I think the general estimate of the amount of whiskey in the United States from the Internal Revenue Department at Washington is about 60 or 70 million gallons.

Q. Is there any reason why under the present condition a distillery cannot run and produce whiskey for non-beverage purposes?

A. I think the Large Distillery is the only one which has a permit to run and up until recently, they have been running but I think the Government will issue a permit to manufacture whiskey for non-beverage purposes—I

am pretty sure of it. The Large Distillery is in Pennsylvania.

Q. You spoke of the sale of your whiskey or the receipts at certain prices. Have you made any deductions for the overhead and the selling expense connected with the disposing of such whiskey as may be in bond?

A. We calculate that our overhead expenses are about 25 per cent and they are increasing all the time on account of the increase in the price of labor. We are paying girls to bottle our whiskey \$3 and \$4 a day when we used to pay them \$8 or \$10 a week and all other labor in proportion. Everything is high. Boxes are two or three times up in price. We used to get a box from the Mengel Box Co. at 26 cents and that same box is 80 cents now. Bottles have increased in price proportionately and so have labels so that the cost instead of being \$1.00 or \$1.10 per case to put up whiskey is now \$3.75 or \$4.00.

Q. When you talk about selling goods bottled and put up in cases you are selling them on the quantity in the bottle and not on the original gauge?

A. No, sir.

Q. There is a loss of approximately 20 per cent in the whiskey from the amount originally put in the barrels?

A. More than 20 per cent.

Q. So that when you are fixing a price on bottled goods you are fixing a price on 20 per cent less than what the goods were originally?

A. We have to take that into consideration, the loss of the whiskey in figuring the cost.

Q. That is the loss in shrinkage in storage?

A. In storage and in dumping.

Q. But the market price placed on the warehouse receipt is based on the—

A. —original proof gallons.

Re-examined by Gen. Dawson.

Q. When you sell a warehouse receipt now and a man pays you the price for it, does the contract require that he pay the storage charges?

A. The warehouse receipts are sold with all charges paid up to the date of sale.

Q. And you say you can get a good deal more for your warehouse receipts for your liquor stored in Boston than in Kentucky?

A. Yes, sir.

Q. And are getting more?

A. Yes, sir.

Q. How much more?

A. I have not noticed as to that whiskey stored in Boston very recently and I am not able to say.

Q. About how much more from your general information?

A. I should say there was 50 cents a gallon difference.

Q. So that if a man wants to buy warehouse receipts from you in Boston you get 50 cents more than you would get for the warehouse receipts in Kentucky?

A. Yes, sir. The whiskey is there stored in this warehouse and the reason we have sent it there is because our trade is very large in the New England States and we wanted to have the whiskey there so that they could get it quickly.

Q. The truth is a man buying warehouse receipts for liquor stored some place besides Kentucky has to pay considerably more than he would pay for warehouse receipts of the same kind stored in Kentucky?

A. Yes, sir.

Q. Have you any of those quotations that you referred to a while ago that you had seen as to the price of liquor outside of Kentucky?

A. No but I think Mr. Flarsheim has some.

Mr. Flarsheim: I have non quoting prices of goods outside of Kentucky but I have similar cards to those produced.

Mr. Taylor: Those are the cards that I have seen referring to Gordon No. 23.

Mr. Flarsheim: These cards gave quotations on good presumed to be unless otherwise mentioned in the original warehouses.

A. C. THOMPSON, called for the defendants, being duly sworn and examined by General Dawson, testified as follows.

Q. Where do you live?

A. Frankfort, Ky.

Q. Are you connected with a distillery?

A. Treasurer of the Frankfort Distillery.

Q. What character of whiskey does your distillery manufacture and handle?

A. Bourbon whiskey and Rye whiskey.

Q. State whether or not since the 12th of March your concern has been able to ship and has sold and shipped from its bonded warehouses any whiskey?

A. We have shipped since the 12th of March some barrel goods and some case goods.

Q. How much altogether in gallons?

A. 75 barrels and 510 cases since the 12th day of March.

Q. Have you the figures to show what your concern shipped after the 16th of January and up to the 12th of March?

A. No, sir.

Q. Will you get that information and transmit it to the stenographer?

A.—Yes. 135 barrels and 573 cases. See letter at back of depositions.

Q. Where has the bulk of your whiskey been shipped to since the 12th day of March?

A. Milwaukee, Chicago and Hartford, Connecticut.

Q. Has it been shipped to retailers or wholesalers?

A. Some to retailers and some to wholesalers.

Cross-examined by Mr. J. Helm.

Q. Was any of that whiskey tax paid before the date when this fifty cent tax law went into effect?

A. The barrel goods was not tax paid before—none.

Q. By Mr. Cooke: How many barrels of whiskey have you in bond at your distillery?

A. 12,000.

Q. 12,000 in bonded warehouses still untaxpaid?

A. Yes, sir.

Q. How many barrels have you shipped since March 12th?

A. 75.

Q. Were those barrels shipped on warehouse receipts?

A. Which had been previously sold.

Q. So you shipped 75 barrels out of 12,000 in your bonded warehouse since March 12th?

A. Yes, sir.

Q. And to people who owned the warehouse receipts?

A. Yes, sir.

Q. So your shipments of barrel goods since March 12th and to May 15th have been 75 barrels out of 12,000?

A. Yes, sir; out of a little more than 12,000. There were twelve thousand and two or three hundred.

Q. By Gen. Dawson: Were those sales made and those shipments made on sale permits?

A. The customer sent the permit in.

Q. So that they were all for sales and it was not the owner of the receipts transferring them from one place to some place else?

A. The owner of the whiskey—of the receipt had the whiskey sold.

Q. But it was going to the trade—it had been sold?

A. Yes, sir.

Q. By Mr. Cooke: You do not know when the whiskey or the warehouse receipts rather had been acquired by the owner?

A. Prior to January 1, 1920.

Q. In other words the barrels were shipped to people who had owned the receipts for sometime?

A. Yes, sir.

Q. By Gen. Dawson: Have you sold any warehouse receipts since the 12th of March?

A. No, sir.

Q. By Mr. Cooke. Your warehouse receipts have not been moving from hand to hand since March 12?

A. They have not.

Q. By Mr. Dawson: You have no way of knowing that?

A. We are trying to locate all the owners of warehouse receipts and we have requested the last owner to notify us when they sell the receipts and we have only been notified of about twenty-five barrels in the last three months that have been sold.

Q. So that this dearth of sales in warehouse receipts was going on before the Vance act was passed—this lack

of trading in warehouse receipts were going on even before the Vance act was passed in March?

A. I suppose so.

Q. By Mr. Cooke: Your whiskey has been moving slowly?

A. Very slow.

Q. In fact, the sales in all markets were restricted?

A. Yes.

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D. L. LALLY called for the defendants, being duly sworn and examined by Attorney General Dawson, testified as follows:

Q. With what distillery are you connected?

A. Labrot and Graham.

Q. At Frankfort?

A. Yes, sir.

Q. Are you able to state to the stenographer the number of gallons of whiskey that has been shipped from your distillery warehouse since the 12th day of March, 1920?

A. We have shipped the proceeds from the bottling of 46 barrels, approximately 580 cases.

Q. Was that all shipped on sale permits?

A. Yes; the customer sent in the warehouse receipts and we bottled it for him from the warehouse.

Q. Are you able to give the stenographer the number of gallons of whiskey you shipped from your warehouse from the 16th of January, 1920, up to and including the 11th day of March, 1920?

A. No, sir; not now.

Q. I will ask you to examine your records covering the period referred to in the previous question and furnished that information to the stenographer?

A. I will do so.

128 barrels or 5,005 gallons of which 78 barrels were transferred in bond to Louisville Public Warehouse Co. See letter.

Q. About how much whiskey has your company in bond?

A. Approximately 2900 barrels—that is the total in bond and out.

Q. Have you sold any warehouse receipts since March 12?

A. No, sir.

Q. By Gen. Dawson. Did you sell any warehouse receipts during the month of January, 1920.

A. No, sir.

Mr. J. E. Opper,  
City.

Dear Sir:

I am handing you the figures you asked for, that is, what our shipments were for January, February, March, April and May, 1920.

They were as follows:

January	9,003.91	Gallons
February	19,766.33	"
March	37,757.56	"
April	20,552.57	"
May	17,092.70	"

This takes in all of the shipments to May 12th, 1920. The 50c tax is payable on the following:

March	884.39	Gallons
April	8,115.00	"
May	10,203.00	"

In other words, the total amount of shipments amount to 104173.07 Gallons.

The shipment exempt of the 50c tax amount to 84968.68 Gallons, and the shipments liable to the 50c tax amount to 19202.39 gallons.

Your very truly,  
(Signed) Thomas J. Leahy.

Mr. Clarence E. Walker,  
Louisville, Ky.

Dear Sir:

As per your request to A. C. Thompson, who was summoned as a witness in the case of J. & A. Freiberg v. Louisville Public Warehouse Co., beg to state that during the period from Jan. 17, 1920, to March 11, 1920, there was shipped from this distillery to points outside of Kentucky 135 barrels and 573 cases of whiskey.

Yours very truly,  
The Frankfort Distillery, Inc.

Mr. Clarence E. Walker,  
901 Realty Building,  
Louisville, Ky.

Dear Sir:

Replying to Attorney General's question as to quantity of whiskey shipped from January 16th, 1920, to and including March 11th, 1920, will say that we shipped 128 barrels or 5005.00 gallons of which 78 barrels were transferred in bond to the Louisville Public Warehouse Co., Louisville, Ky.

D. A. Lally.

1 Total Number of Bbls. Ky. Goods sold during month of January, 1920.

38 Total number of Bbls. Ky. Goods sold during month of December, 1920.

49 Total number of Bbls. Ky. goods taxpaid for customers from January 16th to March 12th 1920, inc.

58 Total number of Bbls. Ky. goods sold from Jan. 16th to Mch. 12th inc.

1371 Total number of cases sold from January 16th to March 12th inc.

6423 Total number of cases sold during the month of January 1920.

341 Total number of cases sold during the month of February, 1920.

5200 Total number of cases exported during the month of January, 1920.

Of the case goods sold after March 12th previously testified to quite a large portion were taxpaid prior to that date (March 12th).



**EXHIBIT GORMAN No. 1**—Clarence E. Walker.

**EXHIBIT GORMAN No. 2—Clarence E. Walker.****FREEDMAN & RICHARD**

Cincinnati, O.

Commission Merchants

609 Mercantile Library Building

May 11, 1920

Long Distance Telephones, Main 721, Main 722

**OUR DAILY SPECIAL****WE QUOTE WAREHOUSE RECEIPTS**

25 bbls. Spring '17 Farmdale Rye (in bond Boston)	1.50
35 bbls. Fall '16 Kickapoo (Illinois goods)	1.40
15 bbls. Spring '16 Haviland Rye (Illinois goods)	1.40
25 bbls. Spring '16 Clinton (Ohio goods)	1.40
5 bbls. Spring '15 Hayner (Ohio goods)	1.45
25 bbls. Spring '15 Jack Beam	1.25
10 bbls. Fall '16 Graves Prune Brandy (Slivovitz) in bond N. Y.	2.60

No. 465

**FREEDMAN & RICHARD**

If What You Want is Not on this Card, Write or Wire Us.

We HAVE it or Will GET It.

NOTE:—As our daily special offerings are at very attractive prices  
we suggest that you wire or telephone your orders as  
"first come will be first served"

**WHAT HAVE YOU FOR SALE? SEND US YOUR LIST**

(Addressed to J. P. Williams, Frankfort, Ky.)

**EXHIBIT GORMAN No. 3—Clarence E. Walker.****FREEDMAN & RICHARD**

Cincinnati, O.

Commission Merchants

609 Mercantile Library Building

May 4, 1920

Long Distance Telephones, Main 721, Main 722

**OUR DAILY SPECIAL****WE QUOTE WAREHOUSE RECEIPTS**

25 bbls. Spring '15 Gibson	2.10
15 bbls. Spring '15 Gibson, Boston Bond	2.10
25 bbls. Spring '17 Kirk's Old Crow Rye	1.35
10 bbls. April '17 Indian Hill	.95
60 bbls. Spring '16 Everglade	1.20
25 bbls. July '16 Haviland Rye, Peoria, Ill.	1.40

No. 464

**FREEDMAN & RICHARD**

If What You Want is Not on this Card, Write or Wire Us.

We HAVE it or Will GET It.

NOTE:—As our daily special offerings are at very attractive prices  
we suggest that you wire or telephone your orders as  
"first come will be first served"

**WHAT HAVE YOU FOR SALE? SEND US YOUR LIST**

(Addressed to Bernheim Dist. Co., 626 W. Main St., Louisville, Ky.)

**Affidavit of T. K. Helm**—Filed May 20, 1920.

Affiant, T. K. HELM, being first duly sworn on oath states:

I am one of the attorneys for the plaintiff in this case and am associated with Levi Cooke of Washington, D. C., also attorney for plaintiff, and about 10:30 A. M., May 10th I received the following telegram:

“Rosenbloom who was here Saturday sent the following telegram to Col. E. H. Taylor.

‘Cooke & Beneman have explained to me their reason for preferring to try case testing validity of Vance Act in Federal court. From their statement of reasons I am inclined to agree that Federal test is preferable. Believe it advisable therefore that State suit be withdrawn. Wire me care Willard Hotel.’

He received the following reply:

‘Have dismissed case although I think you are mistaken.’

Confirming telephone conversation suggest you ascertain whether or not suit has been dismissed in Franklin Circuit Court and use your best judgment regarding communication of state of that record to District Court. Levi Cooke.”

Affiant further says that he telephoned to Kelly C. Smithers, Clerk of the Franklin Circuit Court, who stated that such an order of dismissal had been prepared but could not be entered during the adjournment of Court except by consent and then as of the last day of the Court, which if done would show a dismissal prior to the granting of the restraining order. He further informed affiant that he understood that plaintiff's attorneys, Hazelrigg & Hazelrigg, had communicated with the Attorney General who objected to the entry of the order of dismissal during the vacation of the Court.

Affiant thereupon requested the Clerk of the Court to request plaintiff's counsel, Hazelrigg & Hazelrigg, to advise the affiant as to what was the true status of the proceeding in the case of S. Rosenbloom & Company, plaintiff v. E. H. Taylor, Jr. & Sons, etc., defendants, and affiant has just received from S. Rosenbloom & Company's counsel the following letter:

"J. H. Hazelrigg      D. L. Hazelrigg  
Hazelrigg & Hazelrigg  
Attorneys at law  
Frankfort, Ky.

May 19, 1920.

Mr. T. Kennedy Helm,  
c/o Trabue, Doolan, Helm & Helm,  
Columbia Bldg.,  
Louisville, Ky.

Dear Mr. Helm:

It had been our purpose, following instructions to that effect from our client, Mr. Rosenbloom, to remove any obstacle growing out of the suit here which was in the way of your Federal proceeding at Louisville. When word came from Mr. Rosenbloom, however, our Court had adjourned its April term and no orders can be entered.

Under the circumstances all that we see that can be done is our statement of intention to take such steps, and we could give you copy of a motion which we propose to have entered when Court meets in September just as soon as we hear from Mr. Rosenbloom as to whether this is satisfactory to him.

You are of course familiar with the Rosenbloom suit and know that it involves other questions than the mere constitutionality of the fifty-cent law, namely: whether the whisky bottled for export last year, but which has not been removed from the distillery premises, is liable for the two or the fifty cent tax. Inasmuch as this question involves a very large amount of money we cannot believe that Mr. Rosenbloom desires to dismiss the suit here outright.

As we understand the circumstances however, the only thing in the suit here which stands in your way at Louisville is the matter of injunction and as soon as we hear from Mr. Rosenbloom, after explaining this matter to him fully, we will send you copy of the proposed motion.

Yours truly,  
(Signed) Hazelrigg & Hazelrigg."

DLH:MEH

Further affiant saith not.

T. K. HELM.

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**Opinion**—Filed May 31, 1920.

Motion for preliminary injunction.

Before DENISON, Circuit Judge, and WALTER EVANS and SATER, District Judges.

Decided May 31, 1920.

Section 171 of the Kentucky Constitution provides that taxes "shall be uniform upon all property of the same class subject to taxation." Section 172 says that all property shall be assessed for taxation at its fair cash value. Section 174 directs that all property shall be taxed in proportion to its value—without prejudice to the right to provide for taxation based on income, licenses or franchises. Section 181 says: "The General Assembly may, by general laws only, provide for the payment of license fees on franchises \* \* \* the various trades, occupations and professions, or a special or excise tax."

Prior to 1917, such license taxes as there were on manufacturing or wholesale dealing in distilled spirits had been by way of an annual tax of a fixed sum. In 1917, in the course of a general revision of the revenue laws of the state, it was provided by Chapter 5 of the Acts of 1917, that every corporation or person engaged

in the business or occupation of manufacturing distilled spirits, and every owner or proprietor of a bonded warehouse in the state, in which such spirits are stored, should, in addition to other taxes, pay a license tax of two cents on every proof gallon liable to federal tax; that every distiller and every bonded warehouseman should make quarterly reports showing the amount of distilled spirits removed from the warehouse by payment of the federal tax or transferred under bond during the quarter, and at the time of making the report pay the tax of two cents per gallon. The proceeds of the tax were distributed, twenty per cent to the road fund, thirty per cent to the school fund and fifty per cent to the general fund.

In January, 1920, when the Eighteenth Amendment to the federal constitution was declared to take effect, there remained in storage in bonded warehouses, in Kentucky, approximately 50,000,000 gallons of distilled spirits, and there was approximately the same amount (probably somewhat more) in storage in bond in the remainder of the United States. On March 12, 1920, the Governor approved an act of the General Assembly repealing Chapter 5 of 1917, and substituting a revision of generally similar purport. The first section thereof, as so revised, is as follows:

"Every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits, known as whiskey or brandy or other species of double stamp spirits, in this State; and every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this State, and in removing same therefrom for the purpose of sale, or for any other purpose, shall pay an annual license tax to the Commonwealth of Kentucky of fifty cents on every proof gallon of said distilled spirits so manufactured or

stored in a bonded warehouse, or withdrawn from a bonded warehouse, or transferred therefrom under bond out of the Commonwealth of Kentucky."

Section 2 directed that every owner of a bonded warehouse should make to the State Auditor a monthly report, on the first of each month, showing the number of proof gallons withdrawn or transferred since the last report. Section 3 directed the warehouseman, at the time of making each monthly report, to pay to the Auditor fifty cents upon each proof gallon which had been removed from the bonded warehouse or transferred under bond out of the state, and further provides:

"and for the purpose of securing the payment of the license taxes herein provided for, the Commonwealth shall have a lien on all such spirits stored in such bonded warehouses, together with the other property of the bonded warehouseman used in connection therewith; and in all cases where the spirits so removed or transferred were owned or controlled by another than the bonded warehouseman, then the bonded warehouseman shall collect and pay the tax due on such spirits so removed or transferred under bond, and shall be subrogated to the lien of the Commonwealth."

Section 4 required that every distiller pay this license tax upon the product of his manufacture when removed from his premises, unless then placed in a bonded warehouse; that all distillers shall file a monthly statement with the Auditor showing the amount of spirits so removed and not going into a bonded warehouse, and at the same time pay the specified license tax thereon. Section 5 provides that every person or corporation failing to make reports as directed, and failing to pay the taxes as they become due, shall be guilty of a misdemeanor, and upon conviction be fined not less than \$500 nor more than \$1,000, and that each day that such taxpayer is in

default after the date such report is due "shall be considered and treated as a separate offense." Section 6 gives the proceeds of the tax, sixty-five per cent to the road fund and thirty-five per cent to the general fund. Section 7 declares that the license tax of the statute shall be in lieu of all other license, franchise or excise taxes now imposed by law on persons or corporations engaged in business covered by this Act; and repeals Chapter 5 of 1917. Section 8 recites that, whereas, the business covered and licensed by the Act is not now paying an adequate license tax, and, whereas, liquor in bonded storage is being removed from the bonded warehouses and disposed of without the receipt by the state of adequate license tax, "an emergency is hereby declared to exist, and this act shall take effect from and after the date of its passage and approval by the Governor."

The plaintiff, which is an Ohio corporation, in October, 1916, purchased from the distiller warehouse receipts covering 9,800 proof gallons of whiskey, original gauge, and upon the purchase of these certificates, became and remained the owner of this whiskey which continued in the distiller's bonded warehouse until January, 1920, when it was transferred to a bonded warehouse operated by the Louisville Public Warehouse Company. Thereby, the plaintiff has had, and it has, such constructive possession of the whiskey as the federal laws contemplate before the federal tax is paid. In April, 1920, plaintiff desired to have this liquor transferred, under the existing federal regulations which permit such transfer, to another bonded warehouse in the state of Massachusetts, and directed the Louisville Public Warehouse Company to proceed with such transfer, at the same time tendering payment to the Warehouse Company of all storage charges, *ad valorem* taxes, and all other payments at-



tending such transfer and claimed to be proper, excepting the fifty cents license fee under the Act of 1920. The Warehouse Company refused to permit such withdrawal and transfer, for the sole reason that the fifty cent tax had not been paid, and claimed a lien upon the whiskey to secure such payment.

Thereupon, plaintiff filed this bill against the Warehouse Company and against the State Auditor and the State Attorney General, alleging that the Warehouse Company was unlawfully refusing to make the transfer and that the state officers were threatening to enforce this law and the penalties thereof against plaintiff and the Warehouse Company, and asking that the Warehouse Company be enjoined from further refusing to make the transfer or from further asserting any lien for this fifty cent tax; that the state officers be enjoined from any step attempting to enforce the act or the lien thereof, and that the Attorney General be enjoined from instituting any action, civil or criminal, to coerce the payment of this tax, or to collect the penalties or fines prescribed in the act. A motion for preliminary injunction was made, and the District Judge, proceeding under Sec. 266 of the Judicial Code, caused the motion to be heard before the court as now constituted.

Several questions are involved, and it is not feasible to discuss all of them exhaustively. As to several of them, we state only our conclusions; as to some, we add the reasons which induce the conclusion.

1. *Jurisdiction of this court as a federal court.*

This is clear, first, because the bill shows diverse citizenship with more than \$3,000 involved in money values; and, second, because the bill states a case of rights arising

under the Fourteenth Amendment to the Federal Constitution. It is well-settled that, in the latter case, the federal court has jurisdiction if the claim of federal right is made in good faith and is not frivolous, even though in the end it may turn out to be erroneous.

2. *Case arising under Sec. 266 Judicial Code.*

Two state officers are made parties defendant, and an injunction is sought to prevent them from enforcing the law of the state, which law is said to be unconstitutional. The tax law does not seem to impose upon the auditor any duty of enforcement, nor is it clear that he can do anything which would be harmful enough to call for an advance prohibition. As to the attorney general, the case is different. While this statute does not require him to act, it seems to be understood by all parties, including the attorney general himself, that it is his official duty to enforce the law by bringing, on behalf of the state, all actions and by enforcing all penalties which the law provides for. The bill alleges that he intends to enforce these penalties, and he does not dispute this allegation. The matter has proceeded upon the assumption by the district judge of the district and by all parties, that the case is one contemplated by Sec. 266; and we see no reason to hesitate on this account.

3. *Abatement under Sec. 266.*

By the amendment of March 4th, 1913, it was provided by way of amendment to this section, that proceedings thereunder in any federal court should be stayed pending the determination of the question in the state courts, if

"a suit shall have been brought in a court of the state having jurisdiction thereof under the laws of the state to enforce such statute or order, accompanied by a stay in such state court of proceedings under such statute or order pending the determination of such suit by such state court."

The attorney general shows, by way of abatement or stay of the present application, that a suit has been brought by another owner of whiskey, in a situation analogous to that of plaintiff here, against another warehouseman, the purpose of the suit being to compel the delivery of the whiskey to the plaintiff, who had paid the government tax, and against which delivery the warehouseman was urging that it must collect the fifty cent tax under the law now in question. After the defendant had answered and set up this law and claimed that it ought to be entitled to keep the whiskey until the validity of the law was determined by some competent court, the plaintiff in that case filed an amended petition asking an injunction against the state auditor and the state attorney general to prevent them from enforcing this act; thereupon, an injunction issued in that suit enjoining them "from requiring from the plaintiff, or his agent or distiller in charge, payment of the fifty cent per gallon tax . . . until further orders of the court."

We pass by a serious question as to whether this injunction is valid, and, for present purposes, assume that it is. It does not present such a case as is contemplated by the amendment of March 4, 1913, to Sec. 266 of the Judicial Code. This is for two reasons: The first is that the state court which issued this injunction is not the state court contemplated by the amendment. The action of the federal court is to be superseded or suspended only in case—as we read the statute—"a suit to enforce such statute or order shall have been brought in a court of

the state having jurisdiction thereof under the laws of such state"; and while it is said that this particular state court has jurisdiction to enforce this law because it is the court in which the state might rightfully bring suit to collect penalties, it is entirely plain that the suit which has been brought was not brought to enforce this law. The attorney general would escape this conclusion by saying that the clause "to enforce such statute or order" is dependent upon and defines the word "court," and not the word "suit." This construction is not only—as it seems to us—awkward and unnatural, but it leaves the word "thereof" superfluous and without meaning, and leaves the word "suit" going at large without definition. According to this construction, if only the suit is brought in a court which has jurisdiction to enforce this law, it makes no difference what kind of a suit or what it is about.

The second reason why the amendment of March 4, 1913, does not apply is that it contemplates a stay which will protect against the enforcement of the law the plaintiff who, in the federal court, is seeking the injunction. It is manifest that the stay which only prohibits the attorney general from enforcing the law against another plaintiff in another case, cannot protect this plaintiff in this case, and Congress could not have intended to oust the jurisdiction of the federal courts, excepting where the state courts were providing an adequate substitute. The reasons assigned to Congress for the enactment of this amendment, as shown in the report of the House Judiciary Committee, February 27, 1913, Report No. 1584, indicate that it was intended to reach only those cases where the enforcement by the state was through a court action, brought by some administrative body, for specific performance of the law; but however that may be,

and if the amendment might be invoked when its application was based upon some other kind of an action for some other kind of enforcement of a law, there at least must be identity between the party claiming protection in the federal court and the party who is receiving protection in the state court.

Therefore, considering the papers filed by the attorney general on this subject as a plea in abatement, it must be overruled, and considering them as answers to plaintiff's motion for an injunction, they are insufficient.

4. *Jurisdiction of this court as a court of equity.*

Obviously, equity has no jurisdiction, except upon the theory that an injunction is necessary; and an injunction will not be awarded, if there is an adequate remedy at law. The vital question, then, is, "Is there an adequate remedy at law"?; and, to answer this in the affirmative, we must know what that remedy is.

(a) It is said that the tax may be paid under protest, and that, if the law turns out to be invalid, it will be the duty of the auditor to make a state warrant for repayment, and that this duty will be enforced by mandamus proceedings. If this remedy were clear and certain, it might be "adequate" (1); but its existence is at least doubtful. As a general rule, payment merely under protest, unless some statute expressly provides, is voluntary payment, and suit for recovery will not lie even if there is a defendant who can be sued. This taxing statute does not provide for payment under protest, and does not provide for suing the state to get the money back, even

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(1) *Dow v. Chicago*, 11 Wall. 108, 112;  
*Indiana Co. v. Koehne*, 188 U. S. 681;  
*Boise Co. v. Boise City*, 213 U. S. 276, 282;  
*Singer Co. v. Benedict*, 229 U. S. 481, 487.

if payment were made to release a levy and so were compulsory. The existence of this remedy can depend only on Sec. 162 of the Kentucky Statutes.

This section authorizes the refunding warrant in cases where a tax, which was paid, was "not due"; and a later clause makes reference to "the mistaken payment." In a broad sense, taxes which are invalid because the taxing act is unconstitutional, are "not due"; but the Kentucky Court of Appeals has not yet construed the statute as extending to such a case (2). It has been held not to reach cases where the assessment, made by some board or assessing officers, was invalid on account of their violation of law, and this holding has been put upon the ground that the auditor could not review the action of the assessing officers and determine its validity. On the other hand, cases where the question was whether a tax should be paid under one statute or under another or under both, have been held within the scope of the section. It has been at least strongly intimated that plaintiff cannot demand this warrant unless he paid the tax under the compulsion of distraint or a right of distraint and under a mistake of law or fact. Taxes paid merely under protest cannot be recovered without express provision of law, since mandamus will lie only to compel performance of a plain duty, and since, to require the Auditor, at his peril to determine the unconstitutionality of a legislative act, is to put upon him an extraordinary burden, we must have grave doubt whether this remedy exists. Certainly, the state of the Kentucky decisions does not justify us in saying it is so clear and effective as to be "adequate,"

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(2) *German v. Coulter*, 112 Ky. 577;  
*Louisville v. Coulter*, 112 Ky. 584;  
*Bosworth v. Metropolitan*, 162 Ky. 344;  
*Louisville v. Bosworth*, 169 Ky. 824;  
*Greene v. Taylor*, 184 Ky. 739;  
*Craig v. Security* (March 9, 1920).

in the sense of the fundamental equity requirement. Further, the remedy is by mandamus, a discretionary writ; the plaintiff is entitled to his adequate remedy in the federal court (*U. S. Life Ins. Co. v. Cable*, C. C. A. 7, 98 Fed. 761), and a federal court will mandamus a state officer only in the clearest case. It seems a paradox that a court should refuse an injunction and thus permit an act to be done, and then issue a mandamus to compel its undoing.

(b) Another suggested remedy is that the plaintiff pay the Warehouse Company the tax and immediately sue to recover it back. As to this, it could be answered, first, that a lien given by an unconstitutional law is no lien, and, hence, payment by plaintiff, in order to get possession of his property, would not be compelled by the lien, would be voluntary and suit to recover it back would be defeated for that reason. (3) It could be answered, second, that as soon as the first day of the next month arrived and the Warehouse Company did not pay the tax over to the State, penalties would accrue against the warehouse company at the minimum rate of \$500 per day, and the pendency of the law suit would be no defense against those penalties. Further, plaintiff, in case of failure, would be liable, perhaps directly to the State, for the same penalties, and at least liable over to the warehouse company for their amount. Still further, the warehouseman's personal responsibility may be insufficient.

(c) The same matter of accruing penalties applies to an action of replevin against the warehouseman, after tender of valid charges and claims—if that action would otherwise be appropriate under the Kentucky practice.

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(3) We assume that, if the law is valid, there is a lien effective against the withdrawing owner, though that is not clear. See *infra*.

No one of these suggested remedies accompanied by such contingencies is "adequate" (*Davis v. Wakelee*, 156 U. S. 680, 688; *Walla Walla v. Walla Walla Co.*, 172 U. S. 1, 12; *Union Pacific Co. v. Weld*, 247 U. S. 282, 285).

5. *If the plaintiff is right upon the merits, is there that imminent irreparable injury which alone justifies a preliminary injunction?*

This is, in part, the same question as to whether there is an adequate remedy, but it goes further.

It is not to be doubted that the extravagant and oppressive penalties which accumulate under the law, so that no one could ever refuse payment during the length of time necessary to carry through a test suit, demonstrate irreparable injury under the rule of *Ex parte Young*, 209 U. S. 123, and similar cases, except for two considerations which are said to distinguish.

The first is that this section of the statute imposing these penalties may be considered as separable, and, if obnoxious to controlling principles, may be considered as invalid without affecting the rest of the law—whereby a suit for penalties could be defeated. In advance of a decision by the Kentucky courts, we cannot be assured that this provision is separable. It is the only effective means which the state has for enforcing the law and collecting the tax. We cannot see that the state has any compelling lien. Taxes are not payable until the first of the month after the liquor is withdrawn from the warehouse, and when the liquor is so withdrawn and removed from the state, as the statute contemplates, no effective lien in favor of the state can remain. In those cases where the warehouseman owns the liquor, the purported lien thereon is plainly ineffective in the tax collection.



The effect of the statute might be such, if some difficulties of construction are overlooked, as to give the warehouseman a lien and compel the payment of the tax to pay him before he surrenders the liquor to the owner, but this would not help the state any in collecting from the warehouseman; it would have no weapon, except the penalties, and a lien upon the warehouse which might be of little comparative value.

When we compare the Act of 1920 with that of 1917, we find that the earlier one provided that the Auditor should bring suit to collect the tax, with an eight per cent penalty and with all other interest and penalties provided for delinquent taxes in other cases. The revisers omitted these provisions and substituted only the declaration in Sec. 5 that each day of default shall be a separate offense. The legislative intent to regard this extreme penalty as essential is fairly clear. At least, we cannot presume that the Kentucky Legislature would have regarded this statute as sufficient and effective, without the penalty section, and, in that situation, we cannot pronounce that section separable.

The second distinguishing consideration is that no penalties accrue unless the owner withdraws his liquor, and thus, there is no irreparable injury unless the owner brings it on himself. Ordinarily, a tax becomes due at a fixed date, and thereafter, the penalties against the nonpaying owner accrue in spite of anything he can do.

In this case, as we later construe the act, nothing accrues until the owner makes the first move; and, hence, there is superficial force in the consideration urged, but only superficial. It is to say that it is no injury to a property owner to put an intolerable burden upon a certain use by him of his property, because he may, if he will, refrain from that use. This can not lessen the property-

owner's right to complain of the burden, when the effect is upon any rightfully contemplated use of his property; much more must this be true when the effect is upon the only substantial use which he can make of it; and thus we observe another form of the proposition, later discussed, that the withdrawal of whiskey from the warehouse is not a mere privilege. Plaintiff now desires to ship his whiskey to Massachusetts; to do so is, normally, his absolute right; that may be a better sale market or a better storage place. He says that he wishes to bottle, to save the heavy "outage" incident to the expected long storage, and that this is not allowed at defendant's warehouse, but the facilities which he wishes to use are in Massachusetts; to forbid him to make the best rightful use of his property, is, in fact, to deprive him of his property; and it is no answer to say that postponement of the right is his only injury. There is no visible end to the postponement. He can never test the question in any other way than by this case, until he pays the tax and takes the chance of getting it back; every other owner is in the same position; and if each must wait for some other owner to determine the question, the supposed test case can never start. In the meantime, leakage, evaporation, storage charges and regular taxes eat up—or drink up—the property.

We think the injury is correctly to be called irreparable; and it is not only imminent, it is present.

6. *The alleged discrimination against Kentucky holders.*

We do not see that plaintiff is deprived of the equal protection of the laws, merely because those who own and store whiskey in other states may not have to pay this

tax or an equivalent one, and, therefore, can take the market away from plaintiff. The Fourteenth Amendment cannot insure that each state shall have a taxing system equivalent to that of every other.

Nor are we prepared to say that the statute depends upon a classification, among those who own property in Kentucky, so arbitrary as to be violative of the "equal protection" clause of the Fourteenth Amendment. We do not understand that to impose an otherwise proper license or excise tax upon a privilege with regard to one class of property has ever been thought unlawfully discriminatory for the sole reason that similar privileges as to other classes of property were not similarly taxed; nor can it be thought that it is merely and wholly arbitrary to put a license privilege as to whiskey in bond in a class by itself.

*7. Is there lack of due process of law?*

This is only another form of stating the ultimate question. If the law is invalid for any of the reasons alleged, it is obvious that to enforce collection of the tax is to take the plaintiff's property without due process; hence, we proceed to the reasons alleged.

*8. Is the entire law invalid because of the excessive penalties.*

The penalties are plainly oppressive—lacking any provision for opportunity to test the law. Giving to plaintiff's property a net value of \$1 per gallon (\$1.50 less the tax), and taking every day's delay to pay the tax as a separate offense, the property would be exhausted by the minimum penalties before it was time to

put in an answer to any test suit. This arbitrary character further appears because the fines for willful refusal to pay on 10,000 gallons *cannot* be more than twice as much as they *must* be for the careless neglect to pay on one gallon. We do not see that they are in substance less objectionable than those denounced in *Ex parte Young*, *supra*, see pp. 145-7; and we have already stated our reasons for thinking that the penalty section was inseparable and that the law would not have been passed without it or some substitute for it. Since it is apparent that there rise questions of law and of fact upon which the owner is entitled to have a judicial inquiry, it would seem that this section makes the whole law invalid; but this point is not expressly made in the bill of complaint, though perhaps included within some general terms therein used, it has not been argued by counsel, and we prefer not to rest our decision upon it, but only to refer to it as confirming us in the conclusion later reached.

9. *Had the Kentucky Legislature power to levy such a tax?*

Taxation is of three kinds: upon persons, upon property and upon excises. This is plainly not a capitation tax. The Kentucky Constitution requires that property taxes shall be levied *pro rata* upon all property, and it is conceded that this particular tax can not be sustained as a property tax. That leaves for consideration only excise taxes.

The Kentucky Constitution gives the legislature power to "provide for license fees on . . . occupations," and this statute declares that it levies an occupation tax. So far as it is levied upon the occupation of

manufacturing whiskey, it is within the ordinary definitions and pursuant to the long-settled policy of Kentucky; but so far as it seeks to mark out a separate and distinct occupation or business, the owning and storing and withdrawing of untaxpaid whiskey, it seems to involve a previously unheard of "occupation," and one which, as applied to this subject, is very difficult to distinguish from the occupation of owning property. However, it is unnecessary to rest any conclusion upon a matter of definition. If the statute is a valid exercise of power under any constitutional grant, it ought not to be condemned merely because it adopted a wrong name for itself.

The same clause of the constitution which provides for license taxes for occupations, continues, "or a special or excise tax." There seems no reason to think that the allowable "special" tax was intended to cover a discriminatory property tax or refers to anything which is not fairly to be defined as an excise tax. The ultimate question, therefore, is whether this statute imposes a valid excise tax.

We first meet the problem whether the law intends to impose a tax of fifty cents per gallon per year so long as the business of storing whiskey in bond is continued, or, rather, intends to impose only one fifty cent tax, regardless of the period of storage. In favor of the first view, it is to be noted that the first section expressly declares the tax to be an "annual" one, that, save for changing the definition of the business taxed, the insertion of the word "annual" formed the only change made by the revisers, as compared with Sec. 1 of the Act of 1917, that the Act speaks of "taxes" as though contemplating a plural, and that, although nothing is payable until withdrawal, it would be possible at that time to compute the

tax as having been an annual one accruing year by year up to that date. In favor of the opposite view, it is to be seen that no tax is payable until after a withdrawal or transfer, and that there are express provisions fixing the amount to be paid whenever that time arrives at the sum of fifty cents per gallon. It may be that these conflicting provisions make the statute so unintelligible that it is invalid for that reason, or it may be that it ought to be construed according to the first view. In either of these events, that would be the end of this controversy, since it is entirely clear, and the Attorney General admits, that an annually accruing tax of this amount would be confiscatory and invalid. The Attorney General insists that the latter view above specified is the proper one, and says that this is the view which has been and will be taken by the state officers in enforcing the law. Doubtless he cannot by his position at this time, bind the Kentucky courts as to their ultimate decision of this question; but, for the further discussion of the matters before us, we assume—without deciding—that he is right and that only one fifty cent tax will ever accrue.

It is no objection to the validity of a tax as an excise that it is payable only upon the happening of an event, or that it is measured by the amount of property which that event affects. This principle is illustrated by *Raydure v. Board*, 183 Ky. 84, sustaining the validity of an excise tax upon the output of oil wells.

The objection to this tax goes deeper. It provides, in effect, that the owner of property situate in Kentucky and who has not embarked that property in any business carried on in Kentucky, may not have his property, for sale or use or to carry into some other state, until he has paid a special tax upon it of a half or a third of its value

in addition to all other ordinary and regular taxes. When this law was passed and given immediate effect, there were supposed to be 30,000,000 gallons of whiskey in store in bond in the state. Upon this, the owners had paid the regular *ad valorem* tax every year, and had paid or were liable to pay the regular excise tax of two cents per gallon imposed upon the business of manufacture. Upon no principle can the mere allowing of this property to remain in existence, in the only form in which the federal laws allowed it to remain, be considered as a privilege which the legislature might make conditional upon the payment of a tax for revenue—which depends upon different principles than does a regulatory or inspection tax under the police power. It is true that the quality somewhat changes with age, and it is not inconceivable that a revenue excise tax might rightly be imposed upon the business of storing whiskey for aging purposes, in effect as a branch of the manufacturing business; but it would be distorting this law to attribute to it that purpose. This tax is imposed, not upon the business of storing, but upon the single business of "owning and storing \* \* \* and in removing"; the tax is the same whether the storage has been for one day or for a period of years; upon the defendants' construction, which we are now assuming; out of several successive owners of warehouse receipts, who would thus engage in the storing business, all but the last one go free; the thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, i. e., consumption, sale or keeping it for future consumption or sale. We cannot escape the conviction that it was the real purpose of those who

drafted this law to levy a substantial tax upon this great body of property, as property, and that the form of an occupation or excise tax was adopted in order that an object might be accomplished which the Kentucky Constitution forbade. It is a property tax in the clothes of an excise. The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value. Chief Justice Marshall said in *Brown v. Maryland*, 12 Wheat. 419, 444, "All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself."

In reaching this conclusion, we must give great weight to the fact that the formerly existing law placed an excise tax of two cents per gallon upon the entire combination business of manufacturing, with its incidental storing and withdrawing. This was the legislature's idea of a proper excise tax. After the prohibition amendment and laws had practically stopped the business of manufacturing, and, in common supposition, destroyed the great part of the market for whiskey in bond, the legislature repealed the two cent law and substituted this so-called excise tax of fifty cents, which was to be applied to the mere withdrawal, wholly disconnected from manufacture. If the new tax were to be truly an excise, the circumstances suggested a diminution of the old, rather than an increase of 2500 per cent.

Another special consideration tends to persuade to the same end. An excise or occupation tax, ordinarily, is imposed not merely upon a privilege which the legislature may grant or withhold, but upon a privilege which the prospective taxpayer may accept or decline. Not so here. The owners of whiskey in bond in Kentucky, when this law was passed, could not refuse to engage in the



business of storing it in Kentucky, if they did not wish to pay the tax. The law was given immediate effect, to the effect that and in order that they could not decline; like the Ancient Mariner's audience, they "can not choose but" stay; and in substance it was declared that they became, on that day, subject to pay a tax on account of the business which they had already done, but which, if it were a business, had been free from this tax until that moment.

The principles which limit the definition of a permissible excise tax are discussed in the familiar text books and digests, and, among many instances, by Chief Justice Fuller, in *Pollock v. Farmers' Co.*, 157 U. S. 429, 580, *et seq.*, and by Judge O'Rear, for the Kentucky Court of Appeals, in *Standard Oil Co. v. Commonwealth*, 119 Ky. 75, 79-81. The controlling proposition is that the mere right to own and hold property cannot be made the subject of excises. The principle has been applied, for example, to the mere owning of timber (*Thompson v. Kreuter*, 112 Miss. 165) and to devoting it to a turpentine orchard, the use for which it was most available (*Thompson v. McLeod*, 112 Miss. 383. See the discussion of principles and authorities in these two Mississippi cases). The Corporation Tax Cases (*Zoune v. Minneapolis*, 220 U. S. 187, 191; *McCoach v. Minnehill*, 228 U. S. 295, 302; *U. S. v. Emery*, 237 U. S. 28, 32) are analogous. Plaintiff's acts, like those of the Emery corporation, were "limited to the necessary incidents" of ownership. True, in these cases, the court was trying to find the legislative intent in using the phrase "doing business," and here, we are concerned with the legislative power, but we understand that such power, in this case, rests upon being "engaged in business"; and thus the two questions come to be the same.

We do not necessarily decide the question whether the tax might be good as an excise as applied to whiskey made after the law was passed. Since no license tax is distinctly imposed on manufacturing such whiskey as goes into bond, it might be claimed, with more or less force, that the making, storing and withdrawing was one connected business, the license tax burden being pending until it attached upon the culminating act, the withdrawal. Nothing is now involved except whiskey which had been made and had gone into storage before March 12; and the business or occupation which justifies the excise must be found in what happened since.

10. *Is the tax confiscatory?*

The mere fact that an excise tax, levied under the revenue power, operates practically to prohibit the business taxed, has been held not to make the law invalid when an act of Congress was under consideration (*McCray v. U. S.*, 195 U. S. 27, 51), but the power of the Kentucky Legislature under the Kentucky Constitution is more limited. The Attorney General concedes that a tax which operates to prohibit the conduct of an otherwise lawful business is invalid; the plaintiff contends that this invalidity results when the burden, although not completely prohibitive, is so heavy as to take a large part of the profits of the property. While some of the Kentucky cases invalidate excise taxes because prohibitive, yet they do not necessarily depend for their result, upon the substantially complete prohibition which existed in those particular cases. Other decisions seem to support the plaintiff's contention. In *Owen County v. Cox*, 132 Ky. 738, it was found that the license tax upon the occupation of operating a four-horse dray was such that the owner "could

make little, if anything, more than the amount of the tax." In *Louisville v. Pooley*, 136 Ky. 286, the holding was that a license tax which took respectively from 25 to 100 per cent of the net earnings of those engaged in a business was so far prohibitive as to be beyond the power of the legislature. In *Sallsbury v. Equitable Co.*, 177 Ky. 348, a license tax which was found to amount to one-third of the net earnings of the largest business of the class was considered unreasonable, confiscatory and prohibitive. A number of similar cases are reviewed, and an injunction against the tax was sustained.

Many excise taxes that, as against other business, would seem arbitrary and oppressive, have been sustained as against the liquor business because of its character, but these cases have generally if not always involved the exercise of the police power; the present case involves only a tax for revenue. It is further to be noted both that the mere owning of whiskey and the withdrawing of it from bond has not been held to be a business obnoxious to any public policy, and also, that the recent constitutional and statutory prohibitions of intoxicating liquors as a beverage have gone far to remove the burden of public reprobation from that owning and dealing which the law still permits.

It is plaintiff's contention that, since whiskey in bond can be dealt in only through warehouse receipts, the plaintiff if engaged in any business, is engaged in the purchase and sale of these certificates (although not in Kentucky) with the prospect of making, at the best, only a few cents per gallon, and that the imposition of this tax destroys all of the profits which the average dealer in certificates can make. We do not see that plaintiff is in any better position than his vendor, mediate or immediate, who was the manufacturer, would have been, and

the real question is whether one who had manufactured whiskey and who had it on hand in bond when this law was passed, can complain of the tax as confiscatory.

Considerable proof has been taken by both parties as to the value of whiskey in bond, in order to show what fraction of that value has been taken by the tax. In finding the facts upon that subject which rightfully bear upon this motion, we should give the benefit of reasonable doubts to the state, since the unconstitutionality of the act should clearly appear before there can be an injunction; nor can we consider as controlling the peculiar values which special brands may have on account of special reputation, nor treat the plaintiff in this case any better or any worse than the average of his class; because, with such a question, his peculiar hardships will not avail him nor will his special lack of equity sustain the law. Defendant has proof tending to show that some sales to the retailer of tax paid whiskey are being made at a figure which seems to leave two dollars per gallon for the in bond owner, and that, after deducting cost and expenses and this fifty cent tax, there will be a good profit to the manufacturer. We think these instances are rather exceptional and the computation of costs omits important items. The market price, the regular selling price, of warehouse receipts is the true criterion, because in no other way is whiskey in bond bought and sold.

Plaintiff claims this value is not more than one dollar. Defendant claims it to be a dollar and a half. The facts seem to be that, early in 1920, the general price throughout the country was somewhat less than one dollar; that the imposition of this Kentucky tax tended to depress the price of that stored in Kentucky and to advance that stored elsewhere; that market conditions at about the time of and since the passage of the act, have also tended

to increase the price; and that the present market price of certificates for whiskey in bond, in Kentucky, is about one dollar, and that of certificates for storage elsewhere about one dollar and a half. It is obviously true that if the fifty cent tax were paid by all holders of Kentucky storage, they could not add that amount to their price, because the same act would double the quantity available for the market and depress the price. We think it can fairly be assumed that within a short period after the act was passed and when it began to take substantial effect, whiskies in bond, in Kentucky, as a class, would have been worth about \$1.25, if it were not for this law, and that the tax, therefore, should be considered as taking about forty per cent of that value, and a very large part, if not all, of the normal profits of the manufacturing and storing business (6).

We have said that this tax was not discriminatory merely because whiskey outside of Kentucky is not reached; but this situation has a bearing on the question whether the tax is so oppressive as to be prohibitive under the Kentucky rule. When the federal government imposes an excise tax on whiskey, it operates alike upon the manufacturers and owners throughout the country; all can add the tax to their price, and no manufacturer suffers save from the indirect result of a possibly less consumption. It is otherwise, when a forty per cent tax is laid upon the manufacturers of one state only and their market is a national market. If they add the tax to their selling price, they are out of business, so far as competitive standards control.

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(6) On the question of value, it is not irrelevant that a state board, charged with the duty of assessing at the true value for *ad valorem* taxation, values whiskey in bond at fifty cents per gallon.

In view of these facts, and the Kentucky decisions, we believe this tax to be so prohibitive as to be in violation of the Kentucky constitution.

11. Our conclusion that the tax is invalid is subject to review. No action ought to be permitted by either party, which would make that review unavailable. We think the practical way to prevent the injury to plaintiff arising from perhaps a long suspension of his right to take and have his property free from unlawful burden, and yet to preserve the tax to the state if it shall eventually be found valid, is to provide that the injunction which will permit the plaintiff to take his property out of the state without paying the tax shall be conditional upon the giving of a bond by him. The bond will run to the Commonwealth of Kentucky; it will be in the penalty of \$8,000, approximately double the amount of the tax; it will be subject to approval, both as to form and as to sufficiency of surety or sureties, by the clerk of this court, after notice to the Attorney General of the application for approval; it will be filed with the clerk and be retained by him until it shall hereafter be ordered by the court either to be cancelled or to be delivered to the Commonwealth for suit; and it will be conditioned that the plaintiff pay, or cause to be paid, a tax of fifty cents upon each proof gallon taken, or caused to be removed, under protection of the injunction, without payment of the tax—such payment to be made if and when it shall be finally decided in this cause that the tax is valid and should have been paid, or if and when this cause shall finally fail and be dismissed for any reason.

12. We are informed that other owners of warehouse receipts, situated similarly to plaintiff, desire to, and will, bring similar suits. We think it proper that each such owner should be allowed to intervene in this suit, if

plaintiff does not object, or, lacking intervention, that each such suit should be consolidated with this for the general purposes of hearing and trial. It is clear that the right of each intervenor or plaintiff to an injunction will be the same as the right of the plaintiff here, unless by reason of some special circumstance. We think the substance and the spirit of Sec. 266 have been met by the hearing which has now been had upon this subject before the court of three judges convened under that section, and that it is not necessary to have a further hearing before such special court upon each application for injunction made by any such intervenor or other plaintiff. We therefore approve the issue of preliminary injunction by the District Judge to any such intervenor or plaintiff whose case appears to such District Judge not to be essentially distinguishable from that of this plaintiff, such injunction to be upon the same terms and conditions as prescribed herein.

13. What we have said disposes of the motion for injunction and of the matters urged merely in opposition. The defendant Warehouse Company and the defendants Auditor and Attorney General have filed motions to dismiss. If these were to be granted, they would result in a final decree. We think the court, as now constituted, has no jurisdiction to make a final decree, but is called into existence for the sole purpose of hearing and deciding the motion for a preliminary injunction. Of course, if we have no power to sustain the motions to dismiss, we have no power to deny them. Accordingly, they will stand for hearing before the District Judge in the due course of procedure.

We are aware that upon appeals from orders made under Sec. 266, the Supreme Court has not noticed the distinction between the power to decide the motion for

injunction and to make final disposition of the cause, but we know of no express or necessarily implied ruling on the subject. There are some practical reasons for thinking that the court, thus constituted, ought to retain jurisdiction of the whole case until the end; but we cannot find this power in the statute.

A. C. DENISON,

*Circuit Judge.*

WALTER EVANS,

J. E. SATER,

*District Judges.*

May 31, 1920.

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**Order Granting Preliminary Injunction—Entered**  
May 31, 1920.

In this cause, the motion of plaintiff for a preliminary injunction was considered by the District Judge of the District to require hearing pursuant to Section 266 of the Judicial Code. Thereupon, he called to his assistance Circuit Judge A. C. Denison and District Judge John E. Sater, notice of the motion was given as required by Section 266 and the motion was argued and submitted to the three judges, all as recited in the order of submission dated May 14th, 1920. The three judges, having considered such motion and arguments and the affidavits then filed and the proofs before the Special Master since taken and filed, and having this day filed herein their opinion in writing, signed by all of them, and having directed the entry of this order by their unanimous approval endorsed on the draft thereof filed with the clerk.

It is therefore ordered:



1. The motions of the defendant Warehouse Company and of the defendants Auditor and Attorney General, to dismiss the bill, are continued for disposition in due course by the court, as held by the District Judge.

2. That, until the further order of the court, as constituted under Section 266, the defendant Louisville Public Warehouse Company refrain and desist from asserting any lien by virtue of the Act of March 12, 1920, upon the plaintiff's whiskey described in the bill and from refusing to co-operate in transporting such whiskey to any other bonded warehouse upon plaintiff's request, upon the performance by plaintiff of all conditions required by the laws of the United States or Kentucky, except those required by such Act of March 12; the defendant, John J. Craig, Auditor of Public Accounts, refrain and desist from demanding in any manner the report, upon the removal of such whiskey, contemplated by such Act, and from asserting against such whiskey or against such Warehouse Company on account of such whiskey any lien under such Act, and the defendant, Charles I. Dawson, Attorney General, desist and refrain from instituting any action or proceeding in equity or at law or procuring any indictment or warrant to coerce the payment by plaintiff or by the Warehouse Company of the tax specified in such Act upon plaintiff's whiskey described in the bill, or to enforce against either any penalty or fine prescribed by such act.

3. That writs of temporary injunction issue accordingly.

4. That the taking effect of this order of injunction and the issue of such writ be upon the condition precedent that plaintiff file with the clerk of this court a bond to the Commonwealth of Kentucky in the penalty of eight thousand dollars to be approved both as to form and as

to sufficiency of the surety or sureties by the clerk, after notice to the Attorney General of application for approval, and to be retained by him until it shall hereafter be ordered by the court either to be cancelled or to be delivered to the Commonwealth for suit, and to be conditioned that the plaintiff pay, or cause to be paid, the tax of fifty cents upon each proof gallon taken, or caused to be removed, under protection of the injunction in this cause, without payment of the tax, such payment to be made if and when it shall be finally decided in this cause that the tax is valid and should have been paid, or if and when this cause shall finally fail and be dismissed for any reason.

5. That, upon the filing of any intervening petition against the defendants or any other owner of warehouse receipts, or upon the consolidation with this action for trial and hearing of any other case determined by the District Judge to be suitable for consolidation, and when it appears to the District Judge that the issues are substantially the same as those involved herein and are substantially covered by such opinion in writing filed herein by the three judges, the District Court, held by such District Judge, may order and issue, in each such intervention or case, an injunction similar and upon conditions precedent similar, to those specified herein.

A. C. DENISON,

*Circuit Judge.*

WALTER EVANS,

J. F. SATER,

*District Judges.*

**Petition for Appeal**—Filed June 24, 1920.

The defendants, Louisville Public Warehouse Company, John J. Craig, Auditor of the State of Kentucky, and Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, respectfully represent to the Court that they are, and that each of them is, aggrieved by the decree entered in this case on May 31, 1920, for the reasons set forth in the assignment of errors hereto attached.

WHEREFORE, defendants pray for an appeal to the Supreme Court of the United States, to the end that said decree may be reviewed, and, if found erroneous, reversed.

CHAS. I. DAWSON,  
*Attorney General of the State of  
Kentucky.*

WM. OVERTON HARRIS,  
*Attorney for Louisville Public  
Warehouse Co.*

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**Assignment of Errors**—Filed June 24, 1920.

The defendants, Louisville Public Warehouse Company, John J. Craig, Auditor of the State of Kentucky, and Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, file this, their Assignment of Errors, to-wit:

1. The Court erred in granting the interlocutory injunction herein.
2. The Court erred in holding that the Act of the General Assembly of the State of Kentucky, approved

March 12, 1920, and attacked in the bill, is unconstitutional and violative of the Kentucky Constitution, and especially in holding: (a) That the said Act of March 12, 1920, is void because of excessive penalties imposed for the violation thereof; (b) that the said Act of March 12, 1920, is not a license or excise tax, but a property tax; and (c) that the act is confiscatory and violative of the Constitution of Kentucky.

3. The Court erred in refusing to stay proceedings herein pending the determination of the suit brought in the State Court.

4. The Court erred in holding: (a) That equity has jurisdiction, and that there was no adequate remedy at law; (b) that imminent irreparable injury was threatened, which justified the issuance of the interlocutory injunction; and (c) that to enforce the collection of the tax would result in taking plaintiff's property without due process of law.

5. The Court erred in refusing to sustain defendants' motion to dismiss the bill in equity.

CHAS. I. DAWSON,  
*Attorney General of the Commonwealth of Kentucky.*  
*Counsel for Defendants.*

WM. OVERTON HARRIS,  
*Attorney for Louisville Public Warehouse Co.*

**Order Granting Appeal**—Entered June 24, 1920.

This day came the defendants, by counsel, and presented their Assignment of Errors, appeal bond and petition for appeal, praying for an appeal to the Supreme Court of the United States from the decree entered herein on May 31, 1920, granting an interlocutory injunction; and it is thereupon ordered that the appeal bond be and the same is hereby approved; that the Assignment of Errors, appeal bond and petition for appeal be and the same are hereby filed, and that the appeal to the Supreme Court of the United States be and the same is hereby granted.

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**Bond on Appeal**—Filed June 24, 1920.

KNOW ALL MEN BY THESE PRESENTS: That we, Louisville Public Warehouse Company, John J. Craig (Auditor of the State of Kentucky), and Charles I. Dawson (Attorney General of the Commonwealth of Kentucky), as principals, and W. T. Fowler, as surety, are held and firmly bound unto The J. & A. Freiburg Company in the sum of Five Hundred (\$500.00) Dollars, lawful money of the United States, to be paid to them and their respective executors, administrators and successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors and administrators by these presents.

Sealed with our seals and dated this 22nd day of June, 1920.

WHEREAS the above named Louisville Public Warehouse Company, John J. Craig (Auditor of the State of Kentucky) and Charles I. Dawson (Attorney General of

the Commonwealth of Kentucky) have prosecuted an appeal to the Supreme Court of the United States to reverse the judgment of the District Court for the Western District of Kentucky, in the above entitled cause;

NOW, THEREFORE, the condition of this obligation is such that if the above-named Louisville Public Warehouse Company, John J. Craig (Auditor of the State of Kentucky) and Charles I. Dawson (Attorney General of the Commonwealth of Kentucky) shall prosecute their said appeal to effect and answer all costs if they fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

LOUISVILLE PUBLIC WAREHOUSE CO.,

By WM. OVERTON HARRIS, *Atty.*

JOHN J. CRAIG,

CHAR. I. DAWSON,

W. T. FOWLER.

STATE OF KENTUCKY,  
COUNTY OF FRANKLIN.

Affiant, W. T. Fowler, states that he signed the foregoing bond as surety for the purposes set forth in said bond, and that he is worth in excess of the sum of One Thousand Dollars (\$1,000.00) over and above his just debts and legal liabilities in property which is subject to execution.

W. T. FOWLER.

Subscribed and sworn to before me by W. T. Fowler,  
this 22nd day of June, 1920.

My commission expires May 20, 1924.

(SEAL)

ADDIE BRUMFIELD,  
Notary Public Franklin Co., Ky.

*Stipulation as to Record*

The above bond is approved, both as to sufficiency and form. This 24th day of June, 1920.

WALTER EVANS,  
*Judge District Court of the United  
States for the Western District  
of Kentucky.*

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*Stipulation as to Record—Filed June 24, 1920.*

It is stipulated and agreed between the parties to this action that, for the purpose of taking an appeal from the order of the court granting an interlocutory injunction in this case, the Clerk will copy the entire record in the case save and except the repetition of the caption to the various affidavits and the jurats thereto, and the summonses and various notices filed herein, and the returns thereon; and this stipulation shall be treated as the praecipe in this case.

TRADUE, DOOLAN, HELM & HELM,  
*Counsel for Plaintiff.*

CHAR. I. DAWSON,  
*Counsel for Defendants,*

JOHN J. CRAIG, AND

CHARLES I. DAWSON,

WM. OVERTON HARRIS,

*Counsel for Defendant,  
Louisville Public Warehouse Company.*

**Stipulation Waiving Citation**—Filed June 24, 1920.

The plaintiff, The J. & A. Friberg Company, waives citation and service thereof in this case, and enter their appearance on appeal of this case to the Supreme Court of the United States.

THE J. & A. FRIEBERG CO.,  
By LEVI COOKE,  
TRABUE, DOOLAN, HELM & HELM,  
*Counsel for Plaintiff.*

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**Clerk's Certificate.**

UNITED STATES OF AMERICA, }  
WESTERN DISTRICT OF KENTUCKY. } SS.

I, A. G. RONALD, Clerk of the District Court of the United States for the Western District of Kentucky, do hereby certify that the foregoing transcript consisting of 161 pages, constitutes a full, true and correct Transcript of the Record and proceedings had in said Court in a certain cause, being No. 77 in equity in said Court, in which The J. & A. Freiberg Company (Incorporated) is the Complainant, and Louisville Public Warehouse Company (a corporation), John J. Craig, Auditor of the State of Kentucky, and individually, and Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, and individually, are the defendants, as the same appears of record and on file in said office, and copied herein pursuant to the Stipulation of counsel found on page 160 of this Record.

WITNESS my hand and the official seal of said Court this — day of July, 1920.

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CLERK.